FEB 20 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

---

## No. 28.

---

THE WASHINGTON TERMINAL COMPANY,
Petitioner

v.

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, et al.,
Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

---

# BRIEF FOR PETITIONER ON REARGUMENT.

---

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
1740 BROAD ST. STATION BLDG.,
PHILADELPHIA, PA.
*Counsel for Petitioner.*

FEBRUARY 20, 1943.

LANE & SCOTT, PRS., PHILADELPHIA.

## TABLE OF CONTENTS.


| | PAGE |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED | 2 |
| QUESTIONS PRESENTED | 4 |
| STATEMENT | 7 |
| SPECIFICATION OF ERRORS TO BE URGED | 14 |
| ARGUMENT | 15 |


(For analysis of Argument, with page references, see next page.)

## ANALYSIS OF ARGUMENT.

PAGE

*Introduction and Summary: Statement and Discussion of the Questions Propounded by this Court and of their Relation to the Order and Scope of Petitioner's Argument* ..... 13

SECTION I.

(Answer to the First Part of the Court's First Question.)

NEITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE BY THE COURTS BEFORE SUBMISSION OF THE DISPUTE TO THE BOARD ..... 24

*A. It Has Been Generally Held by the Decided Cases Prior to the Decision in the Moore Case that, Since the Enactment of the Railway Labor Act, and in Spite of the Provisions Thereof Establishing a Statutory Adjustment Procedure, Rail Carriers and Their Employes May Resort to the Ordinary Judicial Courts for the Enforcement of Contracts Between Them Respecting Rules and Working Conditions, Either by Action for Damages or by Bill for an Injunction or Declaratory Judgment* ..... 24

*B. The Analogy of the So-called Doctrine of "Exhaustion of Administrative Remedies," or "Primary Jurisdiction" Doctrine, Which Requires That, in Certain Cases Where Administrative Procedure is Provided by Statute, Resort Must Be Had to That Procedure in the First Instance as a Prerequisite of Access to the Courts, Has no Valid Application to the Adjustment Procedure of the Railway Labor Act, and Does not Require That the Moore Case Should Be Overruled* ..... 31

*1. The Doctrine of "Primary Jurisdiction" or "Exhaustion of Administrative Remedies" Is One of Special and Limited Application* ..... 32

*2. The Grounds Upon Which the Primary Jurisdiction Doctrine or Doctrine of Exhaustion of Administrative Remedies Is Applied Do not Exist With Respect to the Functions and Nature of the National Railroad Adjustment Board* ..... 34

*(a) The National Railroad Adjustment Board is not, as is the Interstate Commerce Commission, an Administrative or Regulatory or Quasi-judicial Tribunal, and is not Charged with the Maintenance of a Statutory Standard, the Uniform Application of Which Would Be Impaired by the Exercise of Jurisdiction by the Courts Without Prior Resort to the Tribunal* ..... 38

*(b) The Decisions of the Adjustment Board do not Proceed from the Informed Judgments of a Continuing Body of Experts* ..... 46

*(c) The Questions "Decided" by the Adjustment Board are not of the Kind to Which the Primary Jurisdiction Doctrine is Applicable Under the Decisions of This Court, Since the Adjustment Board is not in Any Sense a "Fact-finding" Body, and Its Conclusions are not Reached as a Result of Weighing and Considering Evidence* ..... 57

PAGE

*C. To Overrule the Moore Case and Hold that Rail Carriers and Their Employes May not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure of the Railway Labor Act Would Mean in Substance That the 1934 Amendments to the Railway Labor Act Must be Construed as Effecting a Complete and Radical Change in the Character and Legal Effect of the Adjustment Procedure for Handling Railway Labor Disputes, in the Face of an Entire Absence of Anything in the Legislative History of the Act to Show that Congress Intended Such a Result, and Despite the Fact that the Legislative History of the Act Distinctly Shows the Contrary and that Such a Construction Would Lead to Results so Unreasonable and Arbitrary That the Construction Ought not to be Adopted Since not Shown to be Required by the Intent of Congress* ..... 62

*1. The Legislative History of the 1934 Amendments to the Railway Labor Act not Merely Shows an Entire Absence of any Congressional Intent to Effectuate Such a Radical Change in the Policy of the Act as Would be Involved in Holding That Under the Act in its Present Form Rail Carriers and Their Employes may not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure, but in Fact Shows a Contrary Intent on the Part of Congress, viz., an Intent not to Change the Policy of the Act* ..... 64

*2. A Congressional Intent to Require That Rail Carriers and Their Employes May not Have Access to the Courts Without Preliminary Resort to the Statutory Adjustment Procedure Ought not to be Supposed or Implied in the Absence of a Clear Expression of Such Intent, in View of the Fact That Such A Requirement Would Lead to Unreasonable and Arbitrary Results* ..... 70

*D. The Question Whether or not the Moore Case Should be Overruled is not Directly Involved in the Case at Bar, Which Concerns the Employer's Right of Access to the Courts After the Adjustment Procedure Has Been Invoked and Pursued to a Conclusion by the Employe; But, If the Moore Case was Rightly Decided and If Its Reasoning is Correct, Then, Since the Adjustment Procedure is One Through Which the Parties Do not and Cannot Obtain a Judicial Determination of Their Contract Rights, Either Party Must Be Entitled to Such a Determination in the Courts After the Adjustment Procedure Has Been Pursued by the Other Party* ..... 79

SECTION II.

(Answer to the Court's Second Question.)

UNDER THE RAILWAY LABOR ACT THE ADJUSTMENT BOARD MAY AND IN FACT DOES MAKE AN AWARD EX PARTE IF ONE PARTY TO THE DISPUTE DOES NOT APPEAR BEFORE THE BOARD, AND SUCH AWARD IS GIVEN THE SAME EFFECT AS AN AWARD MADE BY THE BOARD AFTER BOTH PARTIES HAVE APPEARED ..... 82

*A. Significance of the Court's Second Question* ..... 82

PAGE

*B. The Adjustment Board Has and Exercises Authority to Determine and Issue Awards in Disputes Submitted to It by One Party Without the Appearance of the Other Party, and Such Awards are Given the Same Effect as Other Awards of the Board* ..... 83

*1. The Language of the Railway Labor Act Supports the View that the Adjustment Board has Authority to Determine and Issue Awards in Disputes Submitted to it by One Party Without the Appearance of the Other Party* ..... 84

*2. The Practice of the Adjustment Board is to Take Cognizance of a Dispute Submitted to it by One Party Without the Appearance of the Other Party and to Enter a Default Award Against the Non-Appearing Party In Such a Case* ..... 87

*3. In View of the Provisions of the Railway Labor Act and the Board's Practice of Entering Default Awards Against Non-Appearing Carriers, The Carriers are as a Practical Matter Compelled to Treat Those Awards as Having the Same Effect as other Awards, and They Accordingly Find it Necessary to Appear Before the Board and Defend Their Rights Against Unilateral Submissions of Disputes by Employes, with the Result that the Carriers Cannot be Said to be Exercising a Voluntary Choice or Election in Appearing Before the Board* ..... 89

SECTION III.

(Answer to the Second Part of the Court's First Question.)

NEITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE IN THE COURTS AFTER SUBMISSION OF THE DISPUTE TO THE BOARD ..... 93

*A. Introduction and Summary of Argument* ..... 93

*B. To Hold that, After a Controversy Has Been Submitted to the Adjustment Board by the Employes, the Employer is not Entitled to a Judicial Determination of Its Rights Under Its Contract With the Employes Otherwise Than in a Statutory Proceeding Brought by the Employes Under Section 3 First (p) of the Act, Would Have The Result of Depriving the Employer Altogether of an Opportunity for a Judicial Determination of Those Rights, and Would Thus Make It Possible for the Employes by Their Unilateral Action to Exclude the Employer from Access to the Courts and At the Same Time Exercise Pressure and Coercion on the Employer to Compel Its Compliance With an Award of the Board in Their Favor, Irrespective of the Employer's Legal Rights* ..... 100

*1. The Provisions of Section 3 First (p) of the Act Do not Afford the Employer a Reasonable or Adequate Opportunity for a Judicial Determination of its Rights* ..... 102

PAGE

(a) *The Possibility of Judicial Relief for the Employer Through a Suit under Section 3 First (p) is not Merely Uncertain for the Reason That Whether or not to Institute Such a Suit Rests Entirely in the Option of the Employes, But is in Fact Completely Illusory and Fictitious Because it is Well Established That as a Result of the Settled Policy of the Labor Unions Suits Under Section 3 First (p) are Never Brought* ..... 103

(b) *Since Judicial Relief Through a Suit Under Section 3 First (p) is Purely Illusory, the Employer, if Denied Access to the Courts Through Any Other Form of Proceeding, is Left in a Position Where the Sole Determination of its Controversy with the Employes Respecting Their Contract Rights is Embodied in an Adjustment Board Award, which is not Merely Arrived at Through Wholly Non-judicial Methods, but Which Furthermore Does not Purport to Adjudicate the Rights of the Parties But Applies Instead What the Board or Its Referees Choose to Regard as a Satisfactory "Adjustment" of the Controversy* ..... 106

*2. The Existence of an Award of the Board Favorable to the Employes, Coupled With the Denial to the Employer of Any Opportunity for a Judicial Determination of the Issues Involved in the Award and the Rights of the Parties With Respect to Those Issues, Successfully Subjects the Employer to the Exercise of Pressure and Coercion by the Employes to Compel Its Compliance With the Award, Regardless of the Employer's Legal Rights* .. 113

(a) *Although an Award of the Adjustment Board is not Enforceable by Legal Procedure If a Suit Under Section 3 First (p) is not Brought to Enforce It, It Constitutes Determination Made Under Statutory Authority, and as Such, if not Subsequently Shown by Judicial Proceedings to be at Variance With the Contract Rights of the Parties, Its Standing is Sufficiently Impressive to Give Rise to a Claim that Noncompliance with Its Terms Constitutes a Grievance, Which Becomes a New Source of Difference and Friction Between Employe. and Employes, and Induces the Application of Pressure to the Former by the Labor Organizations Representing the Latter* ..... 113

(b) *Since the Possibility of Judicial Adjudication of the Employer's Rights Through Section 3 First (p) is Illusory, it Follows That if a Construction of the Railway Labor Act is Adopted Which Forecloses Judicial Relief to the Employer Through Any Other Form of Proceeding, Then the Employes by Bringing About an Adjustment Board Award Through Their Unilateral Action Can Place the Employer in a Position Where it is Effectively Cornered and Left Without Legal Recourse While Pressure is Being Applied to Compel it to Waive its Legal Rights* .. 116

*3. The Contention of Respondents That a Suit Brought by the Employes Under Section 3 First (p) Affords the Employer an Adequate Opportunity for Judicial Relief, and Should Therefore be Held to be Exclusive, Because of Similiarity Between the Language of Section 3 First (p) and the Language of Certain Sections of the Interstate Commerce Act and the*

PAGE

*Packers and Stockyards Act Providing for Statutory Reparation Suits Under Those Acts, Is Unfounded, Because the Analogy Is Inapt and Because Construction of Those Provisions of the Interstate Commerce Act and the Packers and Stockyards Act as Providing Exclusive Remedies Would Not Have the Same Actual Effect as Would the Construction of Section 3 First (p) of the Railway Labor Act for Which Respondents Contend* ..... 123

(a) *The Rule that Identical Statutory Provisions Should Ordinarily be Given Identical Construction Does not Apply Because of Important Differences Between the Statutes in Question, viz., the Interstate Commerce Act and the Railway Labor Act, and those Statutes Are Therefore not in Pari Materia and not to be Construed Alike* ..... 125

(b) *The Decisions Under the Reparation-Suit Provisions of the Interstate Commerce Act Do not Go so Far as to Establish Any Absolute Rule of Exclusiveness, but Simply Hold that Where the Statutory Suit for Reparation is Available Certain Other Remedies are not Available* .. 128

*4. The Inadequacy of the Judicial Relief Available to the Employer, if Its Right of Access to the Courts After an Award of the Adjustment Board Should Be Held Limited to a Proceeding Brought by the Employes Under Section 3 First (p), is not Cured or Compensated by the Opportunity Which the Employer Would Supposedly Have Under the Doctrine of the Moore Case to Resort to the Courts Prior to the Submission of the Dispute to the Adjustment Board by the Employes* ..... 131

*C. The Policy of the Railway Labor Act Does not Require That It Should Be Construed So as to Produce the Arbitrary and Oppressive Results Which Would Follow from Denying the Employer Access to the Courts on Its Own Initiative After an Award of the Board* ..... 137

*1. Congress Had No Intention to Exclude the Possibility of Judicial Determination of Controversies Which Have Already Been Submitted to the Adjustment Board, Since Section 3 First (p) Expressly Provides for Judicial Re-examination of Controversies Already "Adjusted" by Awards of the Board* ..... 139

*2. The Availability of Judicial Redress to the Employer Would Have No More Effect Than Would the Judicial Redress Available to the Employes Under Section 3 First (p) in Unduly Multiplying Litigation, and Would Strengthen Rather Than Weaken the Standing and Effectiveness of Adjustment Board Awards* ..... 143

*3. If Congress Had Intended That the Employer Should Be Excluded from Access to Judicial Relief After an Adjustment Board Award, It is Reasonable to Suppose That It Would have so Constituted That Board as to Insure That It Would Act in a Judicial or Quasi-Judicial Manner, and Would not Have so Framed Its Legislation That It is Impossible for the Board Even to Adopt Rules of Fair Procedure* ..... 146

*4. There is Nothing to Indicate, as Respondents Tacitly Assume, That Congress Intended to Place the Employer in a Position Where, as a Result*

PAGE

*of Being Denied Access to the Courts, It Can Be Coerced by Pressure Into Complying with Awards of the Adjustment Board; and the Availability of Judicial Relief to the Employer as well as to the Employes Would not Render the Adjustment Provisions of the Railway Labor Act "Unworkable" Unless it is Assumed at the Outset That the Purpose of the Act is to Make it Possible for the Employes to Coerce the Employer by Pressure into a Waiver of Its Legal Rights* ..... 147

*5. The Purpose and Intent of the Adjustment Provisions of the Railway Labor Act Can Be Fully Achieved Without Assuming That That Act Embodies a Coercive Process of Compulsory Adjustment, and Therefore the Act Ought not to be Given by Implication a Construction Which Would Produce an Oppressive and Arbitrary Result not Required by its Terms or by the Intent of Congress* ..... 156

*6. If the Principles Advanced by Petitioner Herein Should Be Thought to Require That an Employe Whose Claim Has Been Denied by the Adjustment Board Should be Allowed Recourse to the Courts for a Judicial Determination of His Legal Rights, Such a Result Does not Constitute a Refutation of Those Principles, But on the Contrary Leads to the Conclusion that Such an Employe Should be Permitted Such Recourse, and the Railway Labor Act Properly Construed Does not Present that Result* ..... 167

*D. Preservation of the Advantages Given to the Employes in Suits Brought Under Section 3 First (p) of the Act Does not Require that the Act Should Be Construed So as to Produce the Arbitrary and Oppressive Results Which Would Follow from Denying the Employer Access to the Courts On Its Own Initiative After an Award of the Board* ..... 172

*1. A Proceeding Such as the Present One Would not Bar a Suit Subsequently Brought by the Employes Under the Provisions of Section 3 First (p) of the Railway Labor Act* ..... 176

*2. Assuming That Congress Intended the Advantages of the Procedure Under Section 3 First (p) of the Railway Labor Act to be Preserved to the Employes, the Court Having Jurisdiction of the Declaratory Judgment Suit Would, in the Exercise of Its Discretion, Grant a Stay of That Proceeding Upon the Commencement of a Suit by the Employes Under Section 3 First (p); and to Do Otherwise Would Clearly be an Abuse of Discretion by the Court* ..... 181

*E. The Fact That Petitioner Appeared and Defended Itself Before the Adjustment Board Does not Amount to a Voluntary Choice or Election By It of the Adjustment Procedure So as to Bar it Thereafter From Asserting Its Right to Judicial Relief Subsequently to the Issuance of the Award* ..... 188

SECTION IV.

(Answer to the Court's Third Question.)

THE EXPIRATION OF THE TWO-YEAR PERIOD OF LIMITATION SPECIFIED BY SECTION 3 FIRST (q) OF THE RAILWAY LABOR ACT FOR PROCEEDINGS

PAGE

BROUGHT UNDER SECTION 3 FIRST (p) HAS NO EFFECT IN RESTRICTING THE RIGHT OF EITHER PARTY TO THE DISPUTE TO OBTAIN A DETERMINATION OF IT IN THE COURTS IN A PROCEEDING NOT BROUGHT UNDER SECTION 3 FIRST (p), THE RESTRICTIVE EFFECT OF THE TWO-YEAR LIMITATION BEING CONFINED TO THE LATTER TYPE OF PROCEEDING; BUT ON THE CONTRARY THE EXPIRATION OF THE TWO-YEAR PERIOD SHOULD OPERATE TO PERMIT A PROCEEDING LIKE THE PRESENT ONE NOW TO GO FORWARD EVEN IF THE CONTENTION BE ACCEPTED THAT IT COULD NOT HAVE GONE FORWARD DURING THE TWO-YEAR PERIOD 192

*A. If the View Apparently Held by the Majority Below is Correct, Viz., That the Two-Year Limitation Provided in Section 3 First (q) Operates to Suspend for That Period the Right of Either Party to Resort to the Courts Except in a Section 3 First (p) Proceeding, Nevertheless the Present Proceeding Should Be Permitted to Go Forward Since the Two-Year Period Has Now Expired* ... 197

*B. The Fact That the Two-Year Period of Limitation Has Expired in the Present Case Does not Render the Case Moot or Constitute a Bar to Its Going Forward to a Declaratory Judgment* ..... 202

SECTION V.

(Answer to the Court's Fourth Question.)

THE WORDS "FINAL AND BINDING" IN SECTION 3 FIRST (m) OF THE RAILWAY LABOR ACT CANNOT, CONSISTENTLY WITH OTHER PROVISIONS OF THE ACT, BE CONSTRUED AS HAVING ANY RESTRICTIVE EFFECT UPON THE RIGHT OF EITHER PARTY TO THE DISPUTE TO RESORT TO THE COURTS OR UPON THE SCOPE OF JUDICIAL CONSIDERATION OF THE DISPUTE EITHER DURING THE TWO-YEAR PERIOD OF LIMITATION PRESCRIBED BY SECTION 3 FIRST (q) FOR PROCEEDINGS UNDER SECTION 3 FIRST (p) OR AFTER THE EXPIRATION OF THAT PERIOD ..... 210

*A. The Phrase "Final and Binding" Cannot, Consistently With Other Provisions of the Railway Labor Act, Be Construed as Precluding Altogether Resort to the Courts for Judicial Consideration and Determination with Respect to the Issues Involved in an Award of the Board, or as Limiting Such Resort to Proceedings Brought by the Employes Under Section 3 First (p) of the Act* .... 212

*B. The Phrase "Final and Binding" Cannot, Consistently With Other Provisions of the Railway Labor Act, Be Construed as Limiting the Scope of Judicial Consideration With Respect to the Issues Involved in an Award of the Board* ..... 217

*C. The Phrase "Final and Binding" Can Properly Be Construed Only as Meaning That an Award of the Board is Final and Binding In Any Further Proceeding Before the Board and Unless It Should Be Judicially Pronounced Incorrect or Invalid in a Proper Court Proceeding* ..... 219

*D. The Phrase "Final and Binding" Can Have No Effect Whatever Upon the Rights of the Parties to the Dispute in the Case of an Award With Respect to Which the Two-Year Limitation Has Expired* ..... 220

PAGE

SECTION VI.

TO READ INTO THE RAILWAY LABOR ACT BY IMPLICATION A CONSTRUCTION WHICH WOULD PREVENT PETITIONER FROM MAINTAINING THIS SUIT WOULD VIOLATE ELEMENTARY PRINCIPLES OF PROCEDURAL FAIR PLAY WHICH HAVE ALWAYS BEEN RECOGNIZED AND APPLIED BY THIS COURT IN ITS DECISIONS, AND WOULD ALSO UNDERMINE THE PROCESS OF COLLECTIVE BARGAINING BY DEPRIVING THE CONTRACTS ARRIVED AT BY SUCH BARGAINING OF THEIR CHARACTER AND EFFECTIVENESS AS CONTRACTS AND WOULD REDUCE THEM TO MERE "SCRAPS OF PAPER." . 232

*A. To Hold That This Suit May not Be Maintained Would, as Respondents Themselves Contend, Vest Awards of the Adjustment Board, a Wholly Non-judicial Body, with "Practical Finality," Contrary to Basic Principles Frequently Announced and Applied in Decisions of This Court; and the Contention of Respondents That This Result is Permissible Because the Coercion Which Would Give Finality to the Awards is "Extra-Legal" and not "Legal" Coercion not Only Rests on an Unsound Distinction Which Substitutes Form for Substance, But is Inapplicable Here Because the Coercive Effect of Awards of the Adjustment Board is Made Possible by Provisions of the Railway Labor Act*..... 232

*B. Judicial Self-Restraint Should be Exercised in Reading into Statutes, by Implication and in the Absence of an Expression of Congressional Intent, Novel and Unusual Schemes of Social Compulsion Which Violate Ordinary Standards of Fair Play and Which in the Long Run May React With Disastrous Effect Against the Very Groups and Interests That for the Moment They Appear to Favor*..... 249

## TABLE OF CASES.

PAGE

Adams *v.* New York, C. & St. L. R. Co., 121 F. (2d) 808 (C. C. A. 7th, 1941)..... 26, 224

Aetna Casualty & Surety Co. *v.* Yeatts, 99 F. (2d) 665 (C. C. A. 4th, 1938). 179

Aetna Life Ins. Co. *v.* Haworth, 300 U. S. 227, 57 S. Ct. 461 (1937)..... 178

Amer. Life Ins. Co. *v.* Stewart, 300 U. S. 203, 57 S. Ct. 377 (1937)... 183, 187

Austin *v.* Southern Pacific Co., 50 Cal. App. (2d) 292, 123 P. (2d) 39 (March 3, 1942)..... 223

Ballard *v.* Mutual Life Ins. Co. of New York, 109 F. (2d) 338 (C. C. A. 5th, 1940)..... 179

Balt. & Ohio R. R. *v.* Pitcairn Coal Co., 215 U. S. 481, 30 S. Ct. 164 (1910)..... 37

Baltimore & O. R. Co. *v.* United States, 87 F. (2d) 605 (C. C. A. 3rd, 1937) 129

Berryman *v.* Pullman Co., not reported (W. D. Mo., November 6, 1942)... 226

Board of Railway Commissioners *v.* Great Northern Ry., 281 U. S. 412, 50 S. Ct. 391 (1930)..... 36, 46

Boise Artesian Water Co. *v.* Boise City, 213 U. S. 276, 29 S. Ct. 426 (1909). 179

Brady *v.* Interstate Commerce Commission, 43 F. (2d) 847 (N. D. Va., 1930) 129

Brewster *v.* Rogers Co., 169 N. Y. 73, 62 N. E. 164 (1901)..... 27

Cann *v.* Williams Land & Livestock Co., 56 Nev. 242, 48 P. (2d) 887 (1935). 27

Central Surety & Ins. Corporation *v.* Norris, 103 F. (2d) 116 (C. C. A. 5th, 1939)..... 179

Cook *v.* Des Moines Union Ry. Co., 16 F. Supp. 810 (S. D. Iowa, 1936).... 219

Donovan *v.* Travers, 285 Mass. 167, 188 N. E. 705 (1934)..... 29

Dooley *v.* Lehigh Valley R. R. Co., 130 N. J. Eq. 75, 21 A. (2d) 334 (1941). 25

Evans *v.* Louisville & Nashville R. Co., 191 Ga. 395, 12 S. E. (2d) 611 (1941). 25

*Ex Parte* Young, 209 U. S. 123, 28 S. Ct. 441 (1908)..... 238

Florestano *v.* Northern Pacific Ry. Co., 198 Minn. 203, 269 N. W. 407 (1936). 25

Friederichsen *v.* Renard, 247 U. S. 207, 38 S. Ct. 450 (1918)..... 171

Gary *v.* Central of Georgia Ry. Co., 37 Ga. App. 744, 141 S. E. 819 (1928). 29

George T. Ross Lodge *v.* Brotherhood of Trainmen, 191 Minn. 373, 254 N. W. 590 (1934)..... 29

Grand I. B. of Locomotive Engrs. *v.* Mills, 43 Ariz. 379, 31 P. (2d) 971 (1934) 28

Gt. No. Ry. *v.* Merchants Elevator Co., 259 U. S. 285, 42 S. Ct. 477 (1922). 35, 57, 61

Gregg *v.* Starks, 188 Ky. 834, 224 S. W. 459 (1920)..... 29

Illinois Cent. etc. R. R. *v.* Inter. Com. Comm., 206 U. S. 441 (1907)..... 36

King *v.* Pomeroy, 121 Fed. 287 (C. C. A. 8th, 1903)..... 27

Kline *v.* Burke Const. Co., 260 U. S. 226, 43 S. Ct. 79 (1922)..... 177, 178

Landis *v.* North American Co., 299 U. S. 248, 57 S. Ct. 163 (1936)..... 180, 181

Lane *v.* Union Terminal Co., 12 F. Supp. 204 (N. D. Tex., 1935).... 30, 169, 221

Long *v.* Van Osdale, 26 N. E. (2d) 69 (1940)..... 30, 41

PAGE

Louisville & N. R. Co. *v.* Bryant, 263 Ky. 578, 92 S. W. (2d) 749 (1936)... 25

McCoy *v.* St. Joseph Belt Ry. Co., 229 Mo. App. 506, 77 S. W. (2d) 175 (1934)... 29

McCrory *v.* Kurn, 101 S. W. (2d) 114 (Mo. App., 1936)... 25

McDermott *v.* New York Cent. R. Co., 32 F. Supp. 873 (S. D. N. Y., 1940)... 30, 169, 221

McFadden Securities Co. *v.* Stoneleigh Garage, 55 F. 1025 (App. D. C., 1932)... 170

McGee *v.* St. Joseph Belt Railway Co., 232 Mo. App. 639, 110 S. W. (2d) 389 (1937)... 25

McGregor *v.* L. & N. R. Co., 244 Ky. 696, 51 S. W. (2d) 953 (1932)... 29

Malone *v.* Gardner, 62 F. (2d) 15 (C. C. A. 4th, 1932)... 30, 41

Maryland Casualty Co. *v.* Consumers Finance Service, 101 F. (2d) 514 (C. C. A. 3d, 1938)... 179

Matthews *v.* Rodgers, 284 U. S. 521, 52 S. Ct. 217 (1932)... 179

Milwaukee Gas Specialty Co. *v.* Mercoid Corporation, 104 F. (2d) 589 (C. C. A. 7th, 1939)... 179

Minds *v.* Pennsylvania R. Co., 237 F. 267 (E. D. Pa., 1916)... 130

Moor *v.* Texas & N. O. R. Co., 75 F. (2d) 386 (C. C. A. 5th, 1935)... 179

Moore *v.* Illinois Central R. Co., 312 U. S. 630, 61 S. Ct. 754 (1941)... 5, 14, 15, 24, 26, 62, 79, 94, 132, 150, 160

New York Life Ins. Co. *v.* Roe, 102 F. (2d) 28 (C. C. A. 8th, 1939)... 177

Nord *v.* Griffin, 86 F. (2d) 481 (C. C. A. 7th, 1936, cert. den. 300 U. S. 673, 57 S. Ct. 612)... 26, 85, 174, 221

Oil Well Supply Co. *v.* First Nat. Bank of Winfield, Kan., 106 F. (2d) 399 (C. C. A. 10th, 1939)... 171

Oklahoma Operating Co. *v.* Love, 252 U. S. 331, 40 S. Ct. 338 (1920)... 238, 239

Panhandle & S. F. Ry. Co. *v.* Wilson, 55 S. W. (2d) 216 (Tex. Civ. App., 1932)... 30

Penna. R. R. *v.* Labor Board, 261 U. S. 72, 43 S. Ct. 278 (1923)... 66, 150

Perras *v.* Terminal R. Assn. of St. Louis, 154 S. W. (2d) 417 (Mo. App., 1941)... 25

Petition of State *ex. rel.* Hutchinson, 182 S. C. 369, 189 S. E. 475 (1937)... 27

Piercy *v.* L. & N. R. Co., 198 Ky. 477, 248 S. W. 1042 (1923)... 29

Pittsburgh Terminal Coal Corporation *v.* Bennett, 73 F. (2d) 387 (C. C. A. 3rd, 1934)... 171

Procter & Gamble *v.* United States, 225 U. S. 282, 32 S. Ct. 761 (1912)... 242

Rentschler *v.* Missouri P. R. Co., 126 Neb. 493, 253 N. W. 694 (1934)... 29

Rochester Tel. Corp. *v.* United States, 307 U. S. 125, 59 S. Ct. 754 (1939)... 130, 241

Rosin *v.* Lidgerwood Manufacturing Co., 89 App. Div. 245, 86 N. Y. S. 49 (1903)... 27

St. Joseph Stock Yards *v.* United States, 298 U. S. 38, 56 S. Ct. 720 (1935)... 243

Shannahan *v.* United States, 303 U. S. 596, 58 S. Ct. 732 (1938)... 241

PAGE

Shields v. Utah Idaho R. Co., 305 U. S. 177, 59 S. Ct. 160 (1938)..... 223, 241
Stephenson v. N. O. & N. E. R. Co., 180 Miss. 147, 177 So. 509 (1937)..... 30, 41, 167, 221
Swarts v. South Buffalo Ry. Co., 44 F. Supp. 447 (W. D. N. Y., 1942)..... 30
System Federation No. 59, etc., v. Louisiana & A. Ry. Co., 30 F. Supp. 909 (W. D. La., 1940)..... 221
Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, No. 218, October Term, 1942..... 43, 160
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426 (1907)..... 32, 62
Tex. & Pac. Ry. v. Am. Tie & Timber Co., 234 U. S. 138 (1914)..... 35
Tucker v. Missoula Light & Ry. Co., 77 Mont. 91, 250 P. 11 (1926)..... 27
United States v. Colorado & N. W. R. Co., 157 F. 321 (1907)..... 126
United States v. Ickes, 73 F. (2d) 844 (App. D. C., 1934)..... 171
United States v. Oregon Lumber Co., 260 U. S. 290, 43 S. Ct. 100 (1922)... 170
Unkovich v. N. Y. Central R. R. Co., 128 N. J. Eq. 377, 16 A. (2d) 558 (1934)..... 30
Wadley Southern Ry. v. Georgia, 235 U. S. 651, 35 S. Ct. 214 (1915)..... 238
Wm. W. Bierce, L'd, v. Hutchins, 205 U. S. 340, 27 S. Ct. 524 (1907)..... 171

## TABLE OF STATUTES.

Declaratory Judgments Act, Act of June 14, 1934, c. 512, 48 Stat. 955, 28 U. S. C. 400..... 2
Interstate Commerce Act, Sec. 16(2), Act of June 29, 1906, c. 3591, Sec. 5, 34 Stat. 590 as amended, 49 U. S. C. 16(2)..... 124
Packers and Stockyards Act, Act of Aug. 15, 1921, c. 64, Sec. 309, 42 Stat. 165, 7 U. S. C. 210(f)..... 124
Railway Labor Act, Act of May 20, 1926, c. 347, Sec. 10, 44 Stat. 586-87, 45 U. S. C. 160..... 64
Railway Labor Act, Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151..... 2

## TABLE OF MISCELLANEOUS AUTHORITIES.

Annual Reports of the National Mediation Board, Including the Reports of the National Adjustment Board..... 53, 54, 57, 118
"Awards 2066 to 2200, First Division, National Railroad Adjustment Board," Vol. XII..... 87
Garrison, "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale Law Journal 567, February, 1937..... 103, 115
House Report No. 1944, 73rd Congress, Second Session, 1934..... 64, 67, 70, 149
"Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," Compiled by "Harry E. Jones, Executive Secretary, Eastern Committee for the National Railroad Adjustment Board"... 48, 49, 50, 52, 60, 71, 72, 75, 76, 103, 104, 105, 108, 109, 111, 112, 115, 220
Senate Report 1065, 73rd Congress, Second Session, 1934..... 67
Spencer, "The National Railroad Adjustment Board," University of Chicago Press, 1938..... 105, 115, 220

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

---

No. 28.

---

THE WASHINGTON TERMINAL COMPANY,
*Petitioner,*

*v.*

F. E. BOSWELL, E. R. BURKHEAD, R. R. BRIDGES, *et al.*,
*Respondents.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.**

---

## BRIEF FOR PETITIONER ON REARGUMENT.

---

### OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia (R. 331-48), and the dissenting opinion of Mr. Justice Stephens (R. 348-81), were handed down on November 18, 1941, and are reported in 124 F. (2d) 235.

## JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on November 18, 1941 (R. 382). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C. 347, 43 Stat. 938).

---

## STATUTES INVOLVED.

This suit is brought under and in acordance with the Declaratory Judgment Act of June 14, 1934, c. 512, 48 Stat. 955, 28 U. S. C. 400 *et seq.*, as amended. The pertinent provisions thereof are as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Certain provisions of the Railway Labor Act (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U. S. C. 151 *et seq.*) are involved because they have been relied on by respondents in the courts below. The portions of the Act principally concerned are Sections 3 First (i), (m), (p) and (q), which provide as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and

unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

• • • • • • •

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

• • • • • • •

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein

stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

---

## QUESTIONS PRESENTED.

When this case was before the Court on original argument, petitioner in its brief filed September 25, 1942, stated the questions presented as follows:

1. Whether or not Section 3 First (p) of the Railway Labor Act is to be construed, in the absence of express statutory language to that effect, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, in a case where such a proceeding would otherwise be appropriate.

2. Whether or not Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress

which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes.

3. Whether or not the conclusion of the court below, to the effect that the unilateral submission of a dispute by employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the court to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Railway Labor Act, gives to the Railway Labor Act a construction which is unreasonable and is inconsistent with the construction placed upon it by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (March 31, 1941), wherein it was held that the procedure provided by the Railway Labor Act for the adjustment of such disputes was not intended to be exclusive.

4. Whether or not, in the face of Article III, Section 1, of the Constitution of the United States, and of the due process clause of the Fifth Amendment to the Constitution, a construction of the Railway Labor Act, and more specifically Section 3 First (p) thereof, is to be chosen which would have the effect of making the awards of a non-judicial body, like the National Railroad Adjustment Board, to all practical purposes final and conclusive save at the option of the employes, and which would have the effect of closing the doors of the courts to railroad employers with the result of subjecting them to economic pressure in order to compel them to comply with such awards.

5. Whether or not, even if the National Railroad Adjustment Board is for the purpose of argument conceded to be a public quasi-judicial or administrative tribunal, the right of a party adversely affected by action of the Board, to a judicial reconsideration of the controversy passed upon by the Board, is to be denied, despite the policy of protecting the right to judicial review established by this Court in its recent decisions, especially in *Rochester Telephone Corp.* v. *United States,* and despite the fact that all the requisites for assertion of such right to review, as enunciated in those decisions, are satisfied in the case at bar.

After the original argument, when this Court made its order of November 16, 1942, restoring the case to the docket for reargument, that order of the Court contained the following direction:

> "On the reargument counsel are requested to include in their briefs and oral argument a discussion of the following questions:
>
> "1. Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either before or after submission of the dispute to the Board;
>
> "2. Whether the Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award;
>
> "3. The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts;
>
> "4. The effect of the words 'final and conclusive' in Section 3 First (m) upon the right to resort to the courts and upon the scope of judicial review, (a) during the two-year period, and (b) after expiration of the two-year period."

## STATEMENT.

Petitioner is a corporation which, since 1907, has operated the Union Passenger Station, including an adjacent railroad yard and tracks, in Washington, D. C. Respondents are petitioner's employes, who man its switch engines as engineers and firemen. The facilities of the passenger station and the adjacent yards and tracks are used by The Pennsylvania Railroad Company, the Baltimore & Ohio Railroad Company, the Southern Railway Company, the Richmond, Fredericksburg & Potomac Railroad Company, and the Cheseapeake & Ohio Railway Company—called the Tenant Lines—which operate passenger trains to, from and through Washington. The petitioner itself operates no passenger trains and employs no road-engine or road-train crews.

It has been the continuous operating practice at the Terminal, since it was opened for use in 1907, that, when a loaded passenger train comes into the station at the end of its run and has discharged its passengers at the platform, the road-engine, manned by the road-engine crew which brought the train in over the road, may haul the empty passenger cars to the storage yard en route to the round-house, whenever, in the judgment of petitioner, the efficient and prompt operation of the Terminal is thereby promoted. Similarly, when the preparation of a passenger train to leave Washington is called for, the road-engine, manned by the crew which will operate the train over the road, picks up the empty cars on its way from the engine-house to the station, and backs the train of cars to the platform to receive passengers preparatory to leaving on its trip, whenever efficiency and promptnes of operation so require. These road-engine crews are employes of the Tenant Lines. (Complaint, Pars. 8, 9, 10; R. 5.)

On February 1, 1923, a collective agreement in writing was entered into between petitioner and its yard-engine

employes, the class of employes to which respondents belong. (Complaint, Par. 15; R. 6.) This agreement contained, among other things, provisions regarding so-called "seniority rights" of the employes, which were substantially the same as those which had been contained in the contracts of employment between petitioner and its yard employes since June 1, 1910. (Complaint, Pars. 12, 13, 14, 15; R. 6; Exs. A. B. C. D; R. 15-39.) These "seniority rights" entitled employes to vacancies and new jobs in the order of seniority of the employes who applied for them, and also provided for seniority as a factor in promotion. This agreement, with some immaterial amendments made from time to time, is still in effect. (Complaint, Par. 16; R. 7.)

After these agreements, containing substantially the same terms, had been in effect for many years, petitioner's yard employes advanced the contention out of which the present application for a declaratory judgment ultimately eventuated. That contention was to the effect that the agreement of 1923, by according "seniority" rights to yard-engine employes, thereby conferred upon such employes by necessary implication a monopoly or exclusive right to perform without exception all work on petitioner's premises capable of being regarded or defined as "yard work," and that such "yard work" must be construed as including the work of moving empty passenger trains between the station and the storage yard—this despite the fact that, at the time of the original grant of seniority in 1910 and thereafter, both before and subsequently to the contract of 1923, such work had, under the practice and usage of the Terminal, continuously been performed by road engines of the Tenant Lines manned by road crews. (Complaint, Par. 19; R. 8.) In opposition to this contention, petitioner has consistently maintained that the 1923 agreement cannot lawfully be construed to confer on such employes any exclusive right to do the work claimed, in view of the practice known to, and

understood by, the parties before and at the time when that agreement was made and since that time, in the light of which practice the contract must, on universally accepted principles of general contract law, be interpreted. (Complaint, Par. 32; R. 12.)

After this controversy originated and the yard employes' claims had been rejected by petitioner, the employes without the concurrence or consent or participation of petitioner submitted the claim to the First Division of the National Railroad Adjustment Board. This Board was created by the amended Railway Labor Act enacted by Congress in 1934.

That Act set up the National Railroad Adjustment Board for the "adjustment" of disputes between carriers and their employes arising out of contracts with respect to rules, rates of pay and working conditions. The Board is composed of a number of Divisions. The First Division consists of ten members, five selected by the railroads and five by the national railroad labor organizations. The Act designates the First Division as the one to hear disputes between the carriers and their train and engine service employes. (Complaint, Par. 19; R. 8.)

In accordance with the Board's practice, the First Division, upon receiving the claim of petitioner's yard employes, notified petitioner to file a statement of its position within 30 days, and thereafter fixed a date for the appearance of petitioner and the representatives of the employes. Under the Railway Labor Act (Section 3 First (i)), the Board was authorized to render an award at the request of one of the parties alone, and therefore petitioner was obliged to appear before the Board and separately state its contentions in opposition to the claims, at the risk of otherwise having an award or order of the Division entered against it by default. (Complaint, Pars. 19 to 22, inc.; R. 8.)

At the so-called "hearing" before the Division, witnesses could not be called and evidence could not be intro-

duced because the rules of the Division forbade it. (Complaint, Ex. E; R. 40-43.) Thereafter, the Division was apparently unable to reach a decision because of the deadlock of its members, and, under the provisions of the Railway Labor Act (Section 3 First (l)), a Referee was appointed to sit with the Division and break the deadlock. In accordance with the Division's established practice, no opportunity was given petitioner to appear before the Referee or present to him written or oral arguments on the facts or the law. With the participation of the Referee, the Division decided the claim in favor of the employes, and, on October 24, 1938, it issued an "award" sustaining the claim. (Complaint, Pars. 24, 25, 26; R. 9.)

Petitioner, believing the award to be erroneous in point of law and not required by or in accord with the agreement of 1923, did not change its operating practices to conform to the award. Within a month after the date of the award respondents began to present, and have continued to present, claims and demands upon petitioner for sums of money that they allege they would have earned had they been permitted to perform the work which they claim they have a right to perform under the contract, but which is being performed by road-crews of the Tenant Lines. These claims for payments have been made notwithstanding the fact that many of respondents are and have been, during the period for which the claims are presented, actually engaged in performing yard work in and about the Terminal for which they are already receiving and have received full daily wages. Their demands amount to claims for wages which they contend they should be permitted to earn for performing work now being done by the road-crews of the Tenant Lines, in addition to the wages which they are actually earning. (Complaint, Par. 29; R. 11.)

The Railway Labor Act (Section 3 First (p)) authorizes a person for whose benefit an award by a Division of the Adjustment Board has been made to bring a pro-

ceeding to enforce the rights declared in the award in an appropriate United States District Court, "within two years from the time the cause of action accrues under the award" (Section 3 First (q)). No suit on the award in question has been instituted against petitioner. The Railway Labor Act makes no provision for a statutory method whereby the carrier against whom an award has been made by the Board can invoke the jurisdiction of the courts to determine the validity or legal effectiveness of the award.

The demands of respondents, if conceded in full by petitioner, would require the payment by it of a total amount of approximately $80,000 a year. Petitioner, in addition to being pressed by respondents for payment, was confronted with the dilemma of having to decide between complying at once with the award and thereby waiving all opportunity for judicial determination of its rights and obligations under the contract of 1923, on which the award was purportedly based, or waiting until such time as respondents might choose to sue on the award, in which event petitioner might be compelled to pay the full amount of wages claimed by respondents for work not performed by them, up to the time of suit, in addition to the wages paid to other employes for performing that work. (Complaint, Pars. 28-32; R. 10-13, 57.)*

In other words, if the carrier, faced with an award against it of the kind involved in the present suit, should refuse to comply with the award and at the same time had no opportunity for initiating a proceeding for judicial

*The fact that petitioner does actually pay for the services of the road crews in performing this work, in the form of reimbursement of the Tenant Lines whose employes the road crews are, is admitted by respondents in their Answer filed in the District Court below, where respondents, speaking of the services of the road crews of the Tenant Lines in moving empty and loaded cars in petitioner's yards, said: "* * * periodically the plaintiff is required to pay, and does pay to the Tenant Lines, sums equal to the reasonable value of said services" (R. 57). See also discussion in Judge Stephens' dissenting opinion (R. 367), answering discussion in the opinion of the majority of the Court of Appeals (R. 343-44).

determination of its obligations under the contract on which the award was purportedly based, the employes might wait until the last day of the two-year period before bringing an enforcement suit, in which event, if the enforcement suit were successful, the carrier would be obliged to pay for all the work in question done during the two-year period, as well as for the work done prior thereto since the presentation of the employes' claims, and to pay twice over for such work—once to the employes who in fact performed the work and a second time to the claimants who claim the right to perform the work but did not in fact do it. These circumstances would inevitably constitute a steadily increasing pressure on the carrier to comply immediately with the award by changing its operating practices and thereby reducing the damages to the amount of back wages accruing to the claimants up to the date of such change.

The experience of rail carrier-employers generally under the Railway Labor Act indicated that respondents would not sue promptly or at all on the award but would allow the full pressure of the circumstances to operate, reinforced by exertion of their own economic power, through threat of a strike, for the purpose of obtaining from the carrier full compliance with the award without a judicial determination of the basic rights and liabilities of the parties under their contract.*

Accordingly, petitioner, being desirous of having its rights under the contract judicially determined and having no other method open to it of achieving that result, instituted this suit under the Declaratory Judgments Act to obtain a judicial determination and declaration of its rights and liabilities under the contract of February 1, 1923. (Complaint, Par. 33; R. 13.)

Respondents, in the first defense set up by their answer, alleged that the complaint failed to state a cause of action. In the second defense of their answer, respondents

* See below, pp. 102-23.

contended—apparently because the complaint showed on its face the proceedings before the Adjustment Board—that:

> "(1) The Complaint fails to show the existence of an actual controversy between the plaintiff and the defendants.
>
> (2) The Complaint affirmatively shows that there exists a remedy especially provided by statute for this type of case.
>
> (3) The Complaint affirmatively shows that the purpose of the plaintiff in filing this action was to secure a judicial review of a decision of an administrative Board, a purpose not contemplated by, nor permitted under, the Declaratory Judgments Act.
>
> (4) The Complaint fails to show the existence of any statute or order about to be enforced against the plaintiff, or from the enforcement of which any damage will result to the plaintiff." (R. 55.)

On the grounds thus alleged in the first and second defenses, the District Court, treating these defenses as a motion to dismiss, entered an order dismissing the complaint (R. 326). Petitioner appealed to the Court of Appeals, and that Court, after considering the case for nearly two years, affirmed the District Court in an opinion by Rutledge, *J.*, with Stephens, *J.*, dissenting (R. 331-81; 124 F. (2d) 235-77).

Thereafter petitioner on February 18, 1942, filed in this Court a petition for a writ of certiorari, which was allowed by order of this Court dated March 30, 1942 (R. 383). Briefs were filed by petitioner and respondents on September 25, 1942, and October 9, 1942, respectively. The case was called for oral argument on October 19 and 20, 1942, after which the Court on November 16, 1942, made its order restoring the case to the docket for reargument.

## SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that Section 3 First (p) of the Railway Labor Act is to be construed, despite the absence of express statutory language to that effect or any other indication of such a Congressional intent, as establishing such an exclusive method of judicial procedure, in its application to the facts of this case, that the courts of the United States are thereby ousted of jurisdiction to entertain a declaratory judgment proceeding, where such a proceeding would otherwise be appropriate;

(2) In holding that Section 3 First (p) of the Railway Labor Act manifests an intent on the part of Congress which would be frustrated by permitting a judicial determination of the rights and liabilities of the parties in a declaratory judgment proceeding at the instance of a rail carrier-employer, with respect to a dispute arising out of a contract between the carrier and employes of the carrier, which dispute had been submitted on behalf of the employes to the National Railroad Adjustment Board, a non-judicial body, and which was the subject of an award by that Board in favor of such employes;

(3) In holding that the construction given by it to the Railway Labor Act, to the effect that the unilateral submission of such a dispute by the employes to the Adjustment Board and the issuance of an award thereon ousts the jurisdiction of the courts to adjudicate such disputes otherwise than by suit of the employes under Section 3 First (p) of the Act, is not an unreasonable construction and is not inconsistent with the reasoning of this Court in *Moore* v. *Illinois Central R. Co.;*

(4) In holding that a construction of the Railway Labor Act which prevents the granting of the relief here sought by petitioner does not render that Act of doubtful constitutionality; and

(5) In affirming the judgment of the District Court below.

## ARGUMENT.

**Introduction and Summary: Statement and Discussion of the Questions Propounded by this Court and of their Relation to the Order and Scope of Petitioner's Argument.**

The order of this Court directing a reargument of the case at bar broadens considerably the scope of the issues presented on the original argument, and specifically directs the inclusion in the brief of a discussion of several questions either not discussed, or discussed only in passing, in petitioner's original brief. Accordingly, in compliance with the Court's order, this amplified brief is presented for the purpose of including the additional matters on which argument is now directed.

At the same time petitioner respectfully desires to reiterate its arguments on the points discussed in its original brief, and to that end requests that that brief may be considered as incorporated by reference herein. This request is made because petitioner submits that the arguments presented in that brief cover points which are essential to a decision of the case.

In its original brief petitioner limited itself to contending that it was not precluded from access to the courts in the case at bar by the fact that the controversy at issue had already been submitted to the National Railroad Adjustment Board on behalf of the respondents and had been the subject of an award by that body. Petitioner did not undertake to argue the question whether or not it would have had a right to seek a judicial determination of the dispute, if the dispute had never been submitted to the Adjustment Board, or at any time prior to such submission. This was because petitioner considered that that point had already been decided in the affirmative by this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941). In the Court of Appeals below, where argument was had before the

decision of this Court in the *Moore* case was announced, that point was fully argued. When the Court of Appeals, however, came to render its decision in the instant case, the *Moore* case had already been decided here, and the Court of Appeals regarded itself as bound by that decision, saying (pp. 238-39 of 124 F. (2d); R. 331-32):

> "The decision in *Moore* v. *Illinois Central R. Co.*, 1941, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089, rendered since this case was argued, has put beside the point much of the argument here. The case held that the Railway Labor Act does not preclude an employee from bringing a suit for damages for alleged wrongful discharge contrary to a collective agreement. The plaintiff employee, however, had begun his suit before the administrative machinery had been set in motion. *The decision establishes that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method.* At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial, without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms.
>
> "But the *Moore* case neither presented nor decided the question whether, when one party has put the adjustment procedure in operation, the other may disregard it entirely and at any subsequent stage have a judicial determination of the issues other than that provided by the Act." (Emphasis supplied.)

This Court now requests argument on the point supposed by the court below to have been determined in the *Moore* case. This request is clearly implicit in the phrase-

ology of the first question listed in the Court's order directing reargument, as appears from the italicized words in that question as reproduced below:

> "(1) Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts, either *before* or after *submission of the dispute to the Board.*"

In response to this question petitioner will contend in the following discussion that the *Moore* case was rightly decided, and that that case establishes, in conformity with precedent and principle, the proposition that before a dispute is submitted to the Adjustment Board neither party is precluded from seeking a determination of the dispute by the courts.

Petitioner bases this contention on three grounds:

> (1) It is supported by the unanimous course of precedent prior to the decision of the *Moore* case;
>
> (2) The supposed analogy of the "primary jurisdiction" doctrine, developed in connection with the Interstate Commerce Commission, has no valid application to the National Railroad Adjustment Board;
>
> (3) An opposite conclusion would in substance mean that the 1934 amendments to the Railway Labor Act must be construed as effecting a complete and radical change in the character and legal effect of the adjustment procedure for handling railway labor disputes, in the face of a complete absence of anything in the language or legislative history of the Act to show that Congress intended such a result.

The foregoing argument will be developed below in the first main section of this brief, and is offered as

petitioner's answer to that part of the Court's first question which relates to whether or not a dispute may be submitted to the courts *before* submission to the Adjustment Board. The second part of the Court's first question, which relates specifically to the point involved in the case at bar, viz., whether either party may seek a judicial determination of the dispute *after* its submission to the Board, will be postponed for discussion in this brief until after the Court's second question has been dealt with, viz.:

> "(2) Whether the [Adjustment] Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award."

This order of discussion is adopted because petitioner submits that the answer to this question is necessarily preliminary to the consideration of whether or not an Adjustment Board award must be treated as interposing a bar to subsequent judicial proceedings. This is for the reason that, if, as will be shown below, the Board may and in fact does make an award *ex parte* where one party to the dispute fails to appear before the Board, then the employes may in effect compel submission of the dispute to the Board and may thereby bar the employer-carrier from a judicial determination of its rights, unless it is held that the employer is not precluded from seeking a determination of the dispute by the courts in a proceeding like the present one after the dispute has been submitted to the Board and has become the subject of an award by the Board.

Accordingly, after developing in the second section of this brief the foregoing answer to the second question of the Court, petitioner will proceed in the third section of the brief to discuss the second part of the Court's first question, viz.:

"Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts • • • *after submission of the dispute* to the Board."

This is the question which is specifically raised by the facts of the case at bar, and which is now before this Court for decision.

First of all, it is to be noted that the statute itself in Section 3 First (p) answers this question in the negative so far as the right of the employe to bring a subsequent suit is concerned, at least where the award of the Board is in his favor. The statute thus shows that there is no complete or inherent incompatibility between a subsequent judicial determination of the controversy and a prior award by the Adjustment Board. The sole question is whether the statutory creation of a special judicial procedure for the benefit of the employes in Section 3 First (p) of the Act must be so construed as necessarily to deny to the employer altogether the recourse which it otherwise would have to the courts.

This is the question to which petitioner's original brief was addressed. For the convenience of the Court parts of that brief will be reproduced in the third section of the following argument.

Petitioner will contend in that section that a construction of the Railway Labor Act would be unreasonable and arbitrary which would preclude the employer from access to the courts merely because of prior action by a wholly non-judicial body of the character of the Adjustment Board, and that such a construction is not required either by Section 3 First (p) or by the Act as a whole, interpreted in the light of its legislative history and policy. To permit the present suit to be maintained would not deprive the employes of any advantages which Congress may be thought to have intended to confer on them by the enactment of Section 3 First (p), and alleged statu-

tory analogies requiring a contrary result are not applicable. At the same time an argument from a supposed "policy" of the statute which would defeat the present suit would be inconsistent with the principles announced by this Court in the *Moore* case, and would read into the statute a scheme of compulsory non-judicial "adjustment" which would deny to the employer altogether the protection of its contract rights.

In developing the discussion outlined in the preceding paragraph, petitioner will contend that to allow the present action to be maintained will in no way impair any of the advantages conferred on the employes by the special procedure set up for their use under Section 3 First (p) of the Act. If this is the case, then there is no reason to exclude the employer from access to the courts during the two-year statutory period in which the employes have the right to take advantage of that procedure, since such a result is not needed for the protection of the employes' right during that two-year period. Accordingly petitioner will at this point proceed to a discussion of the third question propounded in the Court's order, viz.:

> "(3) The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts."

Petitioner's answer to this question will comprise the fourth main section of this brief.

In the fifth section of the brief petitioner will discuss the Court's fourth question, viz.:

> "(4) The effect of the words 'final and conclusive'* in Section 3 First (m) upon the right to resort to the

* In this connection it should be noted that, although the Court's order of November 16, 1942, refers in the fourth question to the words "final and conclusive," as if such words were intended to be quoted from Section 3 First (m) of the Railway Labor Act of 1934, examination of that paragraph of the Act shows that the phrase which the Court apparently had in mind appears in that paragraph as "final and binding," and not "final and conclusive."

courts and upon the scope of judicial review, (a) during the two-year period, and (b) after expiration of the two-year period."

In the sixth and final section petitioner will point out that to read into the Railway Labor Act by implication a construction which would prevent the petitioner from maintaining this suit would in substance and practical effect give finality to an award of the Adjustment Board, although such an award is arrived at by neither judicial nor quasi-judicial methods and embodies a so-called "adjustment" that may be made in complete disregard of the parties' contract rights, and that to give effective and practical finality to such an award is at variance with elementary principles of procedural fair-play which have always been recognized and applied by this Court in its decisions; and it should not be of significance that the compulsion or coercion which would give such finality to awards of the Board is merely, as contended by the respondents, "extra-legal compulsion" or "compulsion in fact," as distinguished from compulsion through the operation of legal penalties. However, it will be shown that the compulsion in question does in fact proceed from provisions of the Railway Labor Act and that accordingly the abstract and formal distinctions which respondents attempt to draw between "compulsion in fact" and "legal compulsion," and upon which their whole case ultimately rests, is not a distinction which has any valid application in the case at bar. Petitioner will also point out that a construction of the Railway Labor Act which would prevent it from maintaining this suit would undermine the whole process of collective bargaining by depriving the contracts arrived at by such bargaining of their character and effectiveness as contracts and would reduce them to mere scraps of paper.

The order of presentation which will be followed in this brief may, therefore, be summarized as follows:

Section I will be an answer to the first part of the Court's first question and will be presented under the caption:

> "Neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts before submission of the dispute to the Board."

Section II will be an answer to the Court's second question and will be presented under the caption:

> "Under the Railway Labor Act the Adjustment Board may and in fact does make an award *ex parte* if one party to the dispute does not appear before the Board, and such an award is given the same effect as an award made by the Board after both parties have appeared."

Section III will be an answer to the second part of the Court's first question and will be presented under the caption:

> "Neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute in the courts after submission of the dispute to the Board."

Section IV will be an answer to the Court's third question and will be presented under the caption:

> "The expiration of the two-year period of limitation specified by Section 3 First (q) of the Railway Labor Act for proceedings brought under Section 3 First (p) has no effect in restricting the right of either party to the dispute to obtain a determination of it in the courts in a proceeding not brought under Section 3 First (p), the restrictive effect of the two-year limitation being confined to the latter type of

proceeding; but on the contrary, the expiration of the two-year period should operate to permit a proceeding like the present one now to go forward even if the contention be accepted that it could not have gone forward during the two-year period."

Section V will be an answer to the Court's fourth question and will be presented under the caption:

"The words 'final and binding' in Section 3 First (m) of the Railway Labor Act cannot, consistently with other provisions of the Act, be construed as having any restrictive effect upon the right of either party to the dispute to resort to the courts or upon the scope of judicial consideration of the dispute either during the two-year period of limitation prescribed by Section 3 First (q) for proceedings under Section 3 First (p) or after the expiration of that period."

Section VI will point out the gravity from both the legal and the practical aspect of holding that this suit may not be maintained, and will be presented under the caption:

"To read into the Railway Labor Act by implication a construction which would prevent petitioner from maintaining this suit would violate elementary principles of procedural fair play which have always been recognized and applied by this Court in its decisions, and would also undermine the process of collective bargaining by depriving the contracts arrived at by such bargaining of their character and effectiveness as contracts and would reduce them to mere 'scraps of paper'."

## SECTION I.

**(Answer to the First Part of the Court's First Question.)**

### NEITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE BY THE COURTS BEFORE SUBMISSION OF THE DISPUTE TO THE BOARD.

The point raised by this part of the Court's first question is whether *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941), decided by this Court at the 1940 term in an opinion by Mr. Justice Black, was rightly decided. Petitioner submits that it was.

**A. It Has Been Generally Held by the Decided Cases Prior to the Decision in the Moore Case that, Since the Enactment of the Railway Labor Act, and in Spite of the Provisions Thereof Establishing a Statutory Adjustment Procedure, Rail Carriers and Their Employes May Resort to the Ordinary Judicial Courts for the Enforcement of Contracts Between Them Respecting Rules and Working Conditions, Either by Action for Damages or by Bill for an Injunction or Declaratory Judgment.**

It is plain from the decided cases that the courts have not hitherto regarded themselves as ousted by the Railway Labor Act of 1934 of jurisdiction to consider and determine disputes arising out of collective agreements between carriers and their employes which are of the kind that could under that Act be submitted to the National Railroad Adjustment Board for "adjustment." Since the enactment of the Railway Labor Act in its present form on June 21, 1934, cases have been numerous in which carriers or their employes have resorted to the courts and have been heard on the merits either in actions for damages or in injunction or declaratory judgment

proceedings to enforce rights claimed under contracts of the character which under the Act might have been submitted to the Board. Among such cases are the following:

*Louisville & N. R. Co.* v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749 (1936) (suit for declaratory judgment construing a collective agreement between a railroad and its employes and declaring plaintiffs' seniority rights and other contract rights therein);

*Florestano* v. *Northern Pacific Ry. Co.*, 198 Minn. 203, 269 N. W. 407 (1936) (action for damages for alleged breach by railroad employer of a seniority agreement);

*McCrory* v. *Kurn*, 101 S. W. (2d) 114 (Mo. App., 1936) (action for damages for alleged wrongful discharge in violation of collective agreement);

*McGee* v. *St. Joseph Belt Railway Co.*, 232 Mo. App. 639, 110 S. W. (2d) 389 (1937) (action by employe against railroad employer for damages for loss of seniority rights claimed under a collective agreement);

*Evans* v. *Louisville & Nashville R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611 (1941) (suit by employes to restrain railroad from interfering with their alleged seniority rights);

*Dooley* v. *Lehigh Valley R. R. Co.*, 130 N. J. Eq. 75, 21 A. (2d) 334 (1941) (suit in equity by employe against the railroad and the brotherhood to compel restoration of the plaintiff's seniority status and recovery of lost wages, and to enjoin further alleged violations of contract);

*Perras* v. *Terminal R. Assn. of St. Louis*, 154 S. W. (2d) 417 (Mo. App., 1941) (action by employe against railroad employer for damages for loss of seniority rights claimed under a collective agreement);

*Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A. 7th, 1936, cert. den. 300 U. S. 673, 57 S. Ct. 612) (injunction suit to restrain railroad and certain employes from complying with an award of the Adjustment Board and thereby interfering with plaintiff's seniority rights under a contract with the railroad).*

It will be noted that most of these cases involved the same sort of problem on the merits as that involved in the present case, viz., interpretation of seniority provisions in a contract between the carrier and certain of its employes, and furthermore, that each such case (with the exception noted) was heard and decided by the court on the merits of the substantive problem involved.

In no reported case† has it been held that the courts were ousted of jurisdiction to interpret and enforce an agreement by the fact that the dispute with respect to the agreement was one which, under the provisions of the

* In the *Nord* case, the court granted the injunction not on the merits of the question of the interpretation of the contract but on the ground that the award of the Board was invalid as to the plaintiff, who received no notice of the Board's proceedings and whose seniority rights would have been impaired by compliance with the award; and, in answer to the contention that the court was deprived by the Railway Labor Act of jurisdiction to grant the relief sought, the court said (pp. 483-84 of 86 F. (2d)):

> "Nor do we believe that the Railroad Labor Act in any way limited the jurisdiction of the District Court as previously conferred by 28 U. S. C. A. §41 (1). Section 3, subdivision (p), of the Railroad Labor Act (45 U. S. C. A. §153 (p), provides: 'If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides, * * * a petition,' etc. *The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied.*" (Emphasis supplied.)

*Certiorari* was denied by this Court in that case (300 U. S. 673).

† In *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808 (C. C. A. 7th, 1941), the District Court had dismissed a suit for a declaratory judgment defining plaintiffs' seniority rights as employes of the railroad, on the ground that exclusive jurisdiction with respect to such questions was in the Adjustment Board or the Mediation Board, but this decision was reversed by the Circuit Court of Appeals on the authority of this Court's decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941).

Railway Labor Act, might have been, but was not, submitted to the National Railroad Adjustment Board.

These cases illustrate and apply the elementary principle that, where a statute does not create a new and purely statutory right but simply provides a novel method of procedure for determining and enforcing a right which exists at common law by reason of contract or otherwise, the statutory remedy will be held to be merely cumulative and not exclusive, in the absence of express statutory language indicating a contrary intent. Of numerous decisions illustrating this familiar principle, the following may be cited:

*King* v. *Pomeroy*, 121 Fed. 287, 292 (C. C. A. 8th, 1903);*

*Brewster* v. *Rogers Co.*, 169 N. Y. 73, 80, 62 N. E. 164, 165 (1901);†

*Rosin* v. *Lidgerwood Manufacturing Co.*, 89 App. Div. 245, 247-8, 86 N. Y. S. 49, 51-2 (1903);

*Tucker* v. *Missoula Light & Ry. Co.*, 77 Mont. 91, 98, 250 P. 11, 14 (1926);

*Cann* v. *Williams Land & Livestock Co.*, 56 Nev. 242, 252, 48 P. (2d) 887, 890-1 (1935);

*Petition of State ex. rel. Hutchinson*, 182 S. C. 369, 374-5, 189 S. E. 475, 477 (1937).

It is of course clear that the Railway Labor Act does not create the substantive legal rights involved in the disputes for the "adjustment" of which it provides its

* Judge Sanborn stated the rule in that case as follows (p. 292): " * * * where a statute simply gives a new remedy in a case in which the right and an appropriate remedy existed before its enactment, it is cumulative, and not exclusive, and *the party injured is at liberty to pursue either remedy.*" (Emphasis supplied.)

† In that case the rule was stated by the New York Court of Appeals as follows (p. 165 of 62 N. E.): "The general rule is that, if a new right be given by statute, and a remedy for the invasion thereof be prescribed, the statutory remedy is exclusive; but *if there be an existing right and a common-law right of action for its violation, then the statutory remedy is only additional or cumulative.*" (Emphasis supplied.)

peculiar procedure, and no one contends that it does. Those rights arise out of contract and exist under common law. Respondents have not only admitted but have insisted that the rights in dispute in the case at bar are not created by the Act, but arise out of the collective agreement of 1923. Thus, in their memorandum brief in the District Court (Defendants' Memorandum Brief, p. 51; R. 117), they have stated that after the issuance of the award of the Board, as well as prior thereto, whatever rights they claim are based on the contract and not on the award or order of the Board. Their language is as follows:

> "These claims, however, are *based upon the Agreement of 1923—not upon the order of the Board.*" (Emphasis as in Defendants' Brief.)

And again at page 53 of the same brief (R. 119):

> "When the individual defendants presented to the plaintiff individual claims for compensation, they necessarily based those claims upon the Agreement—not upon the order (*i. e.*, of the Adjustment Board) which has no substantive effect and is in exactly the same position as to its substantive rights and obligations as it was before the order was issued."

Prior to the enactment of the Railway Labor Act of 1934, labor contracts of the character here in question, between carriers and their employes, formed the subject of controversy in the courts under the applicable principles of common law and equity, and the courts took jurisdiction of their interpretation and enforcement. Among a long list of such cases may be cited the following:

> *Grand I. B. of Locomotive Engrs.* v. *Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934) (suit to enjoin railroad and brotherhood from interfering with plaintiffs' alleged seniority rights by merger of two railroads);

*Gary* v. *Central of Georgia Ry. Co.*, 37 Ga. App. 744, 141 S. E. 819 (1928) (action for damages for alleged wrongful discharge in violation of a collective agreement);

*Gregg* v. *Starks*, 188 Ky. 834, 224 S. W. 459 (1920) (suit in equity for an injunction to restrain defendant railroad and its general manager from removing plaintiff from his position as conductor on a certain train);

*Piercy* v. *L. & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923) (suit for declaratory judgment construing agreement between employes and the railroad and declaring plaintiff's rights thereunder);

*McGregor* v. *L. & N. R. Co.*, 244 Ky. 696, 51 S. W. (2d) 953 (1932) (action by a telegraph operator against the railroad to enforce seniority rights under a contract between the railroad and telegraphic employes);

*Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705 (1934) (suit in equity to compel recognition of the plaintiff's seniority rights);

*George T. Ross Lodge* v. *Brotherhood of Trainmen*, 191 Minn. 373, 254 N. W. 590 (1934) (suit in equity to restrain labor union and the Northern Pacific Railway Co. from interfering with plaintiff's seniority rights);

*McCoy* v. *St. Joseph Belt Ry. Co.*, 229 Mo. App. 506, 77 S. W. (2d) 175 (1934) (action for damages for breach of an agreement regulating seniority);

*Rentschler* v. *Missouri P. R. Co.*, 126 Neb. 493, 253 N. W. 694 (1934) (action to recover wages alleged to be due for a period during which plaintiff was out of work due to a reduction in forces —plaintiff alleged violation of a seniority agreement);

*Unkovich* v. *N. Y. Central R. R. Co.*, 128 N. J. Eq. 377, 16 A. (2d) 558 (1934) (suit in equity to compel recognition of the plaintiff's seniority rights); *Panhandle & S. F. Ry. Co.* v. *Wilson*, 55 S. W. (2d) 216 (Tex. Civ. App., 1932) (action for damages for alleged breach of an agreement covering seniority).

In view of these decisions and the principle which they illustrate, it is clear that rights under labor contracts derive from those contracts and not from the Railway Labor Act, and that all that that Act does is to provide, alongside the established legal remedies, an available procedure for informal settlement and adjustment of controversies.* It follows that, under the elementary

* The fact that no new substantive rights are created by the Railway Labor Act and that the substantive foundation for suits to enforce provisions in contracts between carriers and their employes is the contract itself and not the provisions of the Railway Labor Act is shown by a number of cases holding that, in the absence of diversity of citizenship or other recognized ground of Federal jurisdiction, an employe has no standing to seek enforcement of his contract rights in a Federal court, except in a suit brought in accordance with the provisions of Section 3 First (p) of the Railway Labor Act: *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204 (N. D. Tex., 1935); *McDermott* v. *New York Cent. R. Co.*, 32 F. Supp. 873 (S. D. N. Y., 1940); *Swartz* v. *South Buffalo Ry. Co.*, 44 F. Supp. 447 (W. D. N. Y., 1942); cf. *Malone* v. *Gardner*, 62 F. (2d) 15 (C. C. A. 4th, 1932). In addition to the cases cited above (pp. 25-26), from the decisions of state courts which have assumed jurisdiction of disputes arising out of contracts between carriers and their employes notwithstanding the Railway Labor Act, the following may be cited as sustaining the proposition that the employes in such cases do have standing in the state courts to enforce their contract rights: *Stephenson* v. *N. O. & N. E. R. Co.*, 180 Miss. 147, 178-9, 177 So. 509, 519 (1937); *Long* v. *Van Osdale*, 26 N. E. (2d) 69, 74 (1940), affirmed without comment on this point, 218 Ind. 483, 29 N. E. (2d) 953 (1940). In the *Stephenson* case it was said (pp. 177-9 of 180 Miss.):

> "Neither the carrier nor the employee against whose interest an award has been made is given any right under the act to go into the United States District Court as a plaintiff or complainant. *Then, most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all of the courts of the land.* * * * Hence, such an employee who has lost his cause before the Adjustment Board must necessarily resort to a State Court of competent jurisdiction, or lose the property rights involved in a seniority contract with his employer." (Emphasis supplied.)

principle referred to above, the statutory remedy provided in Section 3 First (p) of the Railway Labor Act should, in the absence of express statutory language to the contrary, be held to be merely cumulative and not exclusive of other remedies, since the Act does not create the substantive rights on which the suit is founded.

Plainly, if this Court should now hold that the availability of the adjustment procedure under the Railway Labor Act precludes resort to the courts by either party for determination of a dispute arising out of a collective agreement between a carrier and its employes, except in a proceeding under Section 3 First (p) after the issuance of an award by the Board with respect to that dispute, then this Court in so holding would be deciding in a manner inconsistent with the generally held view, as reflected in the decided cases, including the decisions of the courts of last resort of many states.

**B. The Analogy of the So-called Doctrine of "Exhaustion of Administrative Remedies," or "Primary Jurisdiction" Doctrine, Which Requires That, in Certain Cases Where Administrative Procedure is Provided by Statute, Resort Must be Had to That Procedure in the First Instance as a Prerequisite of Access to the Courts, Has no Valid Application to the Adjustment Procedure of the Railway Labor Act, and Does not Require That the Moore Case Should Be Overruled.**

In the opinion of the majority of the Court of Appeals below it is said that this Court's decision in the *Moore* case establishes that the Railway Labor Act

> "has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method." (R. 332; p. 238 of 124 F. (2d).)

The question is now raised by this Court whether the Railway Labor Act does make exhaustion of the so-called "administrative" remedy through the procedure of the Adjustment Board prerequisite to the exercise of jurisdiction by the courts over disputes which under that Act may be taken to the Adjustment Board. Petitioner submits that the Act requires no such prerequisite for judicial cognizance of disputes of that character, and that the decision in the *Moore* case is, therefore, correct. The interjection into this case of the doctrine of "exhaustion of administrative remedies," or the "primary jurisdiction" doctrine, as it is sometimes called, is inappropriate for two reasons: first, because the doctrine is not one of general but is of special and limited application; and, second, because the grounds upon which the doctrine is applied do not exist with respect to the National Railroad Adjustment Board.

1. The Doctrine of "Primary Jurisdiction" or "Exhaustion of Administrative Remedies" Is One of Special and Limited Application.

This doctrine, to which appeal is made for the purpose of overruling the *Moore* case, originated in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). In that case a shipper, without complaining to the Interstate Commerce Commission, brought suit in the courts against a carrier to recover for the payment of an allegedly excessive and unreasonable interstate rate. The rate in question was in fact published in a tariff which the carrier had filed with the Commission, as required by the Interstate Commerce Act, and from which the carrier was therefore, under that Act, not lawfully permitted to deviate. The question was whether, under these circumstances, the shipper was entitled to the judgment of a court as to the reasonableness of the rate or whether, under the Act, it was necessary that he should proceed through the Commission. He claimed that his right to

proceed through the courts in the first instance was a common law right of which the statute should not be construed to deprive him. In approaching that contention this Court, speaking through Mr. Justice White, used the following language (p. 437 of 204 U. S.):

> "A statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

The Court, therefore, proceeded to examine what would be the effect of the exercise of the right claimed by the shipper under the circumstances of the particular case, and went on to say (p. 440 of 204 U. S.):

> "For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, *which the statute casts upon that body*, of seeing to it that the *statutory requirement as to uniformity and equality of rates is observed.*" (Emphasis supplied.)

In other words, in view of the statutory requirement of uniform rates and in view of the fact that the Commis-

sion was the body charged by the statute with protecting and preserving rates in accordance with that statutory requirement, it followed necessarily that any procedure which defeated the power of the Commission to maintain the required uniformity of rates would render the statutory mandate nugatory. Hence, it was held that a right to proceed in the courts in disregard of the procedure through the Commission was necessarily inconsistent with the provisions of the statute.

The ruling, in other words, was not to the effect that merely because there was an available procedure through an administrative body that procedure must be used to the exclusion of the procedure through the courts; it was only to the effect that where the procedure through the courts, rather than through the administrative body, would have some specific result in rendering nugatory a provision of the Act, like that which required uniformity of rates, the administrative procedure would to that extent be held to oust the jurisdiction of the courts.

It therefore seems clear that the primary jurisdiction doctrine or doctrine of the exhaustion of administrative remedies is not in any sense a doctrine of general application to administrative bodies as such, but applies only where special reasons exist for its application.

2. The Grounds Upon Which the Primary Jurisdiction Doctrine or Doctrine of Exhaustion of Administrative Remedies Is Applied Do not Exist With Respect to the Functions and Nature of the National Railroad Adjustment Board.

The doctrine of the *Abilene Oil* case has not been held to require that the courts should be ousted of jurisdiction generally over all controversies which may be brought before the Interstate Commerce Commission. In every case in which it has been applied, the ground for its application has been fundamentally that stated by Mr. Justice White in the passage above quoted, namely, the need for protecting the Commission in the performance of

its statutory obligation to maintain proper rate levels and to eliminate discriminations in rates and practices by insuring uniformity. Anything which interferes with this power of the Commission is necessarily an impairment of its administrative or regulatory authority and of its effectiveness in preserving the uniformity required by the statute, and accordingly, when any question arises of which the independent determination by a court might interfere with this regulatory or administrative authority of the Commission and with the effective exercise of its statutory function, it is of course held that the question must be decided by the Commission in the first instance. This is why certain special determinations of fact which are essential to the consistent application of the statutory standards committed to the Commission's enforcement are held to be necessarily for the primary determination of the Commission. That this requirement of consistency and uniformity in the application of statutory standards is at the basis of the doctrine is shown, for example, in the opinion written by Mr. Justice Brandeis for this Court in *Gt. No. Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477 (1922). Thus he says in that opinion (at page 291 of 259 U. S.):

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. • • • It is required because the enquiry is essentially one of fact and of discretion in technical matters; *and uniformity can be secured only if its determination is left to the Commission.*" (Emphasis supplied.)

And elsewhere in the same opinion, in explaining the decision in *Tex. & Pac. Ry.* v. *Am. Tie & Timber Co.*, 234 U. S. 138 (1914) (at p. 293 of 259 U. S.):

> "The only real question in the case was one of fact. • • • As that question, unlike one of construction,

> could not be settled ultimately by this court, *preliminary resort to the Commission was necessary to ensure uniformity.*" (Emphasis supplied.)

This language of Mr. Justice Brandeis illustrates with particular clarity the reason why prior resort to the Commission must be had in certain cases in order to preserve the required uniformity in the application of the statutory standards. Where the statutory standard is one of reasonableness, for example, or the prevention of discrimination in rates, determination of the question usually requires the weighing and analyzing of a mass of voluminous technical evidence bearing on highly complex fact issues, and it is obvious that in such a situation the required consistency and uniformity can be attained only by the application of the skilled judgment of a continuing body of experts "informed by experience" in the technical field in which the question arises.*

The fact that this is the basis of the doctrine of primary jurisdiction has been frequently pointed out in the opinions of this Court. Thus, Mr. Justice Brandeis in the opinion in the *Merchants Elevator* case, already referred to, used the following language, in referring to determinations as to reasonableness and unjust discriminations (p. 291 of 259 U. S.):

> "That determination is reached ordinarily upon *voluminous and conflicting evidence; for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts.*" (Emphasis supplied.)

Again, this Court said, through Mr. Chief Justice Hughes, in *Board of Railway Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 50 S. Ct. 391 (1930), at pages 421-22 of 281 U. S.:

---

* See *Illinois Cent. etc. R. R.* v. *Inter. Com. Comm.*, 206 U. S. 441, 454 (1907).

"The inquiry would necessarily relate to *technical and intricate matters of fact,* and the solution of the question would demand the exercise of sound administrative discretion. *The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision.* Only through the action of such a body could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend." (Emphasis supplied.)

In *Balt. & Ohio R. R.* v. *Pitcairn Coal Co.,* 215 U. S. 481, 30 S. Ct. 164 (1910), this Court referred, on page 496 of 215 U. S., to "the destructive effect upon the system of regulation devised by the act to regulate commerce" if it were construed as "giving authority to the courts, without the preliminary action of the commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body."

Clearly, the reasons thus stated in the cases cited above, and particularly by Mr. Justice Brandeis in the *Merchants Elevator* case, as the basis for the doctrine of primary jurisdiction, have no application to the present case. They have no such application because: (*a*) the body to which it is claimed in this case that preliminary resort must be had, viz., the Adjustment Board, is not, as is the Interstate Commerce Commission for example, an administrative or regulatory or quasi-judicial tribunal, and is not charged with the maintenance of a statutory standard, such as the uniform maintenance of railroad rates, which would be impaired by the exercise of jurisdiction by the courts without prior resort to the tribunal; (*b*) the decisions of the Adjustment Board do not proceed from the informed judgments of a continuing body of experts; and (*c*) questions decided by the Adjustment Board are not of the kind to which the primary

jurisdiction doctrine is applicable, since the Adjustment Board is not in any sense a fact-finding body and its conclusions are not reached as a result of weighing and considering evidence.

(a) *The National Railroad Adjustment Board is not, as is the Interstate Commerce Commission, an Administrative or Regulatory or Quasi-judicial Tribunal, and is not Charged with the Maintenance of a Statutory Standard, the Uniform Application of Which Would Be Impaired by the Exercise of Jurisdiction by the Courts Without Prior Resort to the Tribunal.*

The National Railroad Adjustment Board is in no sense a regulatory or administrative or quasi-judicial tribunal. It is simply an extremely informal body which makes decisions or awards, often through an outside referee, in controversies growing out of the interpretation of contracts. It has no statutory provisions to police and no statutory standards to apply. It is not charged by the statute with the duty of maintaining any uniformity of rates or practices or rules or working conditions. Unlike the Interstate Commerce Act, which specifically charges the Interstate Commerce Commission with the duty of securing uniformity of rates in its maintenance of the statutory standards of reasonableness and prevention of discrimination, the Railway Labor Act sets up no statutory standards to guide the Adjustment Board in its interpretations of the contracts brought before it.

It will be pointed out below (pp. 158-66) that the function of the Adjustment Board is primarily to suggest formulas for the voluntary "adjustment" or settlement of disputes growing out of contracts between particular employes in the railroad industry and their employers. It may of course be a proper part of the exercise of that function for the Board to consider and interpret the contracts giving rise to the disputes. But, in so far as the Board purports to make such interpreta-

tions, there is nothing in the Act that authorizes or requires the Board to attempt to maintain uniformity in its interpretation of contracts which are widely different as between different employers—as the contracts involved in disputes before the Board frequently are—or to be guided, in making such interpretations, by any considerations other than the terms of the contracts and their meaning, as disclosing the intentions of the parties, in accordance with ordinary principles of contract law. There is nothing in the Act to indicate that, when the Board purports to interpret such a contract, its interpretation should be different from the interpretation that would be placed on the same contract by the courts, and presumably there should not be any such difference, in the absence of any expression of Congressional intent in the Railway Labor Act that different principles of interpretation should be applied or that the contract should be altered without the parties' consent. Certainly no such Congressional intent is expressed in the Act or is indicated by any of its provisions.

Thus, the provisions of the Act setting up the Adjustment Board and defining its functions with respect to the "adjustment" of disputes growing out of contracts between carriers and their employes do not include any authorization to the Board to impose on the parties any interpretation of their contract different from that which an ordinary court would adopt. The conclusion that the statutory adjustment procedure must be employed, to the exclusion of the ordinary procedure which would be followed in the courts for the interpretation of these same contracts, neither appears from the face of the statute nor follows from the doctrine of the *Abilene Oil* case, the reasons for that doctrine being absent. That conclusion, as to the exclusive character of the statutory adjustment procedure, can be reached only by assuming the point to be proved, namely, that the Congressional intent as manifested in the Railway Labor Act would be frustrated by holding such procedure not exclusive.

The fact that the Adjustment Board was not intended by Congress to be charged with the maintenance of a statutory standard, the uniform application of which would be impaired by the exercise of jurisdiction by the courts without prior resort to the Board, is further demonstrated by limitations upon the Board's authority which appear upon the face of the Railway Labor Act. As pointed out above, the reason underlying the primary jurisdiction doctrine is that, where the maintenance of a statutory standard, involving the determination of technical and intricate questions of fact, is committed to the authority and discretion of a statutory tribunal, the desired uniformity and effectiveness in the maintenance of that standard would be impaired and interfered with if the courts were permitted in some instances, without prior resort to the statutory tribunal, to pass upon the same types of technical questions as those which were determined by the statutory tribunal in other instances. Thus, if Congress had intended the Adjustment Board to be the kind of statutory tribunal which the primary jurisdiction doctrine contemplates, it would have provided in the Act that the Adjustment Board should have authority to determine in the first instance all questions arising within the supposedly technical field in which the Board is claimed to have expert knowledge and experience.

But the Railway Labor Act shows on its face that Congress did not intend and did not provide that the Adjustment Board should have exclusive authority and discretion within any such field, and that on the contrary Congress expressly limited the Board's authority so as to exclude it in some instances from consideration of questions arising within that field, even though the questions raised in those instances might involve the same supposedly technical questions, growing out of the same or similar operating practices and agreements, as those involved in other instances in which the Board is authorized to act. Section 3 First (i) of the Act defines the disputes

of which the National Railroad Adjustment Board may take cognizance as "disputes between an employee or group of employees and a carrier or carriers." It therefore plainly excludes from the Board's consideration cases of disputes arising primarily between one employe or group of employes on the one hand, and another employe or group of employes on the other hand.* Again, in Section 3 Second of the Act provision is made for the establishment, by mutual agreement of a carrier or carriers and any class of its or their employes, of a system, group, or regional board or boards of adjustment, for the purpose of adjusting and deciding disputes of the same character as those which may under other provisions of the Act be submitted to the National Board. Where such a system board of adjustment is established by mutual agreement, such board would have authority with respect to and would in fact determine disputes of the same character as those submitted in other cases to the National Board, and the National Board would have no authority with respect to such disputes falling within the terms of the agreement establishing the system board, at least so long as that agreement remained in effect.

Thus, a question involving the interpretation of a particular provision in an agreement and the application of that provision to a particular operating practice may in one case, where the dispute is between the carrier and its employe or employes, be considered and determined by the National Adjustment Board, while in another case, where the dispute is between two employes or groups of employes, as to their respective seniority rights, for example, the same question, involving the same contract provision and the same operating practice, is excluded from consideration by the Board, and is therefore subject

* It was so held in *Stephenson* v. *N. O. & N. E. R. Co.*, 180 Miss. 147, 166-67, 177 So. 509, 514 (1937); *Long* v. *Van Osdale*, 26 N. E. (2d) 69, 73 (1940), affirmed without comment on this point, 218 Ind. 483, 29 N. E. (2d) 953 (1940); cf. *Malone* v. *Gardner*, 62 F. (2d) 15, 20 (1932).

only to consideration by a court in the first instance. Or, a question arising on one railroad, which is properly within the authority of a system board established by agreement for that railroad, may be the same as the question involved in a dispute arising on another railroad, which properly falls within the authority of the National Adjustment Board. Obviously, such a statutory scheme does not proceed from the assumption, inherent in the primary jurisdiction doctrine, that the statutory tribunal must be given exclusive authority to determine in the first instance all questions arising within the supposedly technical field in which it is claimed to be specially trained, since in some cases questions within that field may properly be considered by the National Board while in other cases questions of the same type, involving the same supposedly technical fact issues, would be excluded from the National Board's consideration and would therefore admit of no alternative except that of consideration by the courts in the first instance or by system boards of adjustment.

It follows from these considerations that the National Railroad Adjustment Board is unlike the Interstate Commerce Commission, in that the Adjustment Board is not an administrative or regulatory or quasi-judicial tribunal and is not intended by Congress to be charged with the maintenance of a statutory standard, the uniform application of which would be impaired by the exercise of jurisdiction by the courts without prior resort to the tribunal. Accordingly, the primary jurisdiction doctrine should be held to have no application with respect to the National Railroad Adjustment Board.

The fundamental difference between the National Railroad Adjustment Board, on the one hand, and an administrative tribunal charged with the maintenance of statutory standards in the regulation of a particular field of activity, such as the Interstate Commerce Commission, on the other hand, has been very recently recognized by

this Court. In *Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen*, No. 218, October Term, 1942, this Court held unanimously, in an opinion by Mr. Justice Jackson handed down January 18, 1943, that the National Railroad Adjustment Board was not vested by the Railway Labor Act with regulatory authority within the field of wages, hours, and working conditions in the railroad industry, so as to exclude regulatory action by a state commission within that field. The question was whether an order of the Illinois Commerce Commission, requiring the carrier to provide caboose cars on certain of its trains in the interest of the health, safety, and comfort of the trainmen, constituted an invasion of a field assigned by the National Railway Labor Act to the Adjustment Board. It was assumed by this Court that the dispute between the carrier and the trainmen regarding the providing of the caboose cars in question, out of which the order of the Illinois Commission grew, was one which the Adjustment Board would have had authority to consider and determine, as a dispute involving working conditions. Speaking for this Court, Mr. Justice Jackson held that the order of the Illinois Commission did not constitute an invasion of a field exclusively assigned to the Adjustment Board, and said:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. *The national interest expressed by those Acts is not primarily in the working conditions as such.* So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. *The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The*

*federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers.*

"* * * We hold that the enactment by Congress of the Railway Labor Act was *not a preemption of the field of regulating working conditions themselves* and did not preclude the State of Illinois from making the order in question." (Emphasis supplied.)

Thus, this Court expressly recognized in that case that the function of the National Railroad Adjustment Board is not that of regulation, much less of exclusive regulation, of conditions within a given field, and therefore does not come in conflict with or exclude the exercise of regulatory powers within that field by a tribunal whose function does embrace such regulation. Even though the Adjustment Board may have authority to determine a question which arises within a field previously committed to another tribunal, such as a state regulatory commission, which is charged with regulation and with the maintenance of statutory standards within that field, there is no conflict of jurisdiction or occupation of the field by the Adjustment Board, because the latter Board is charged with an entirely different function, namely, that of composing differences between employer and employes and arranging "adjustments" so as to prevent, if possible, disagreements between carriers and their employes from interfering with interstate commerce. On the one hand, the Illinois Commerce Commission is charged with the maintenance of a certain standard of conditions, for the purpose of maintaining the health and safety of workers. On the other hand, the Adjustment Board, in taking cognizance of a dispute between employer and employes with respect to

working conditions is not charged with the maintenance of any standard as to the health and safety of the employes but is concerned only to "adjust" the dispute between the employer and the employes, so as to prevent that dispute from creating an interference with interstate commerce.

The plain conclusion from this reasoning in the *Terminal Railroad Association* case is that no statutory standard requiring uniformity of application, and therefore exclusiveness of jurisdiction to insure such uniformity, has been committed by the Railway Labor Act to the care of the Adjustment Board. Whether the dispute which comes before the Board is one involving rates of pay, working conditions, seniority in assignment to jobs, or other matters in controversy between employer and employes, within the purview of the Railway Labor Act, the Adjustment Board is not charged by the statute with the duty of maintaining any level of pay, any standard of working conditions, or any other standard. Its statutory objective is confined to the "adjustment" of disputes, and to suggesting for possible agreement whatever course of action may be necessary to bring about such adjustment, whether the rates of pay be raised or lowered or working conditions be improved or not. As stated by Mr. Justice Jackson, the national interest expressed by the Act "is not primarily in the working conditions as such," which conditions, so far as the Act is concerned, "may be as bad as the employees will tolerate or be made as good as they can bargain for."

Since Congress did not commit to the Adjustment Board any statutory standard requiring uniformity of application, there is no basis for presuming that Congress intended to vest the Board with an exclusiveness of jurisdiction of the kind which under the primary jurisdiction doctrine is thought to be necessary to insure uniformity in the maintenance of a statutory standard. As this Court expressly held in the *Terminal Railroad Association* case,

"The enactment by Congress of the Railway Labor Act was not a preemption of the field of regulating working conditions themselves," and therefore action by a state commission exercising administrative powers to regulate conditions within that field was not excluded. For the same reason, exercise by state courts of judicial powers to regulate and adjudicate relations between citizens of the state growing out of a contract between them should not be excluded—as it would be if the *Moore* case is overruled or if petitioner is not permitted to maintain this suit—by the fact that a dispute submitted to the state courts for such adjudication is one which might have been or has in fact been submitted to the National Railroad Adjustment Board.

(b) *The Decisions of the Adjustment Board Do not Proceed from the Informed Judgments of a Continuing Body of Experts.*

Recurring to the language of Mr. Chief Justice Hughes, quoted above, in the opinion of this Court in *Board of Railway Commissioners v. Great Northern Ry., supra,* the primary jurisdiction doctrine stemming from the *Abilene* decision applies to "an expert body continuously employed in administrative supervision." The Adjustment Board, as stated in the preceding section, is not a body employed, continuously or otherwise, in administrative supervision of any kind; nor is it in any sense an expert body. It has none of the characteristics bringing it within the operation of the principle that when an expert administrative body exists it should have primary jurisdiction over "technical and intricate matters of fact," demanding "the exercise of sound administrative discretion." That the Adjustment Board is not an expert body of this character falling within the category of such Federal agencies as the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, and similar administrative agencies, is shown by the nature of the Adjustment Board, its composition, the method of appointment and com-

pensation of its members, and its method of operation. The members of the Board themselves are neither impartial nor expert, nor are they in any proper sense representatives of the government, since they are selected and compensated not by the government but by the parties whose disputes they are called on to decide.

The National Railroad Adjustment Board consists of four divisions or groups, each of which is composed of an equal number of partisan representatives of the employers and of the employes' organizations. Each division is authorized by the Act (Sec. 3 First (h)) to hear disputes involving specified classifications of employes. The Act itself shows that the Board is not, and is not intended by Congress to be, a body of public administrative officials appointed by governmental authority and compensated from the public treasury. The Act provides (Sec. 3 First (a)) that the Board shall consist of members, half of whom are selected by the carriers and half by such organizations of employes, national in scope, as have been or may be organized in accordance with the provisions of Section 2 of the Act. It is further provided (Sec. 3 First (g)) that "Each member of the Adjustment Board shall be compensated by the party or parties he is to represent."* In this respect the Board is, of course, a body of an altogether different type from a tribunal like the Interstate Commerce Commission, whose members are appointed by the President for fixed terms and are paid from the United States Treasury. Obviously, members of the Adjustment Board who are selected and paid by one of the parties to a dispute pending before the Board, and whose tenure may be

*The Act does provide that, where a referee is called in for the purpose of breaking a deadlock among the members of the Board, such referee shall be paid by the Mediation Board, which is a governmental agency (Sec. 3 First (g)). However, it will be pointed out below (pages 53-57) that a referee who is thus called in for particular cases is not a regular member of the Adjustment Board and is in no sense a specially trained administrator of the specialized character found in the case of a member of the Interstate Commerce Commission, for example.

terminated by such party at any time, cannot be considered to be expert public administrative officials of the impartial and specialized character found in the case of members of the Interstate Commerce Commission and other like public administrative agencies. The very phrase "to represent," used in the language just quoted from Section 3 First (g), in itself shows a Congressional view that members of the Adjustment Board do not sit in a judicial or quasi-judicial or administrative capacity, as representatives of the government charged with the duty of protecting the public interest, but instead function as partisan *representatives* of the party or parties by whom they are selected and compensated and whose disputes they are called on to decide.

The Board has been described as follows (Compilation,* p. 83):

> "Of the Board's thirty-six members, eighteen are in the employ of carriers and eighteen are employees of labor organizations. *Board members are selected and paid by their respective principals, not by the government.* Members on both sides serve only at the will of their respective principals, and although some members are reluctant to acknowledge it, *the principals' wishes usually seem to take precedence over all other considerations in determining the Board's policies.* The Board is thus bipartisan in fact as well as in theory." (Emphasis supplied.)

* This and other references designated "Compilation" refer to the volume entitled "Inquiry of the Attorney General's Committee on Administrative Procedure Relating to the National Railroad Adjustment Board," issued by Harry E. Jones, "Executive Secretary, Eastern Committee for the National Railroad Adjustment Board, 5710 Grand Central Terminal, New York City," which includes a reprint of documents and stenographic minutes prepared in the course of the investigation of the National Railroad Adjustment Board by the Attorney General's Committee on Administrative Procedure in 1940. This "Compilation" was issued in the same year, immediately after the conclusion of that investigation, and copies were filed with this Court at the time of the previous argument, as embodying an informative mass of material collected in the course of a governmental investigation.

The bipartisan character of the Adjustment Board runs through and colors the entire activity of the Board and its Divisions. Because of the fact that the Board consists of an equal number of members representing the employers and the employes, respectively, the Board has frequently found it extremely difficult, if not impossible, to come to agreement even with respect to comparatively simple questions regarding its own procedure, since either side is able to block the adoption of a rule. A dispute has recently arisen upon which an opinion of the Attorney General has been rendered as to whether or not, under the Act, it is possible to call in a referee to break a deadlock on the adoption of rules of procedure. The Attorney General ruled that it was not. (See Opinion of Attorney General in letter addressed to the President on August 4, 1942.)

The carrier members of the Adjustment Board have commented on this situation in the following words (Compilation, p. 222):

> "The Board as a whole has adopted a skeleton of rules, but insufficient, in the opinion of the carrier members, to bring about that functioning of the Board contemplated by the Act. Supplementary rules have been adopted by some of the Divisions that have improved the procedure before those Divisions; however, the labor members of the First Division (to which Division about 80 per cent of all disputes reaching the Board are referred, and in which the greatest congestion of docket now exists) have consistently declined to adopt the additional supplementary rules that are essential for the proper functioning of that Division. Efforts of the carrier members to secure adoption of uniform rules for all Divisions have been futile.
>
> "* * * The situation on the First Division is convincing evidence that the present practices and rules

of procedure are totally inadequate and in fact, as now applied, are in violation to some extent of the provisions of the Act. Although the law makes provision for breaking a deadlock on disputes referred to the Board, it makes no provision for breaking a deadlock of the Board on the adoption or enforcement of its own rules. As a consequence, carrier members subscribed to such rules as now exist with the full expectation that necessary modifications and amplifications of the rules would later be effected and merely in order to start the Board in operation, not because they considered them adequate or proper to insure that functioning of the Board contemplated by the Act."

The attitude out of which this situation has arisen has been described by a representative of the Attorney General's Committee on Administrative Procedure as follows (Compilation, pp. 86-87):

"Indispensable to even a superficial understanding of the Board's functions is a taste of the general atmosphere in which it carries on its work. *All is not serene and peaceful as in most theoretically nonpartisan government agencies, but the bipartison character of the agency makes itself felt even in the personal relations of the Board members among themselves.* It seems to be a fact that about once every two weeks tempers in Division I become so inflamed that one Board member challenges a Board member of the other side to a fight. A referee relates that he once invited a member from each side, separately, to lunch with him. Each invitation was at first accepted, but when each member learned that the other member was to be present, both members definitely declined. It is said that never yet have a labor member and a carrier member of Division I lunched

together, although they sit at the same hearings day in and day out and work in adjoining offices. Members of Division I on both sides have not hesitated to express in strong language to an outsider their firm conviction that members of the other side are 'dishonest,' 'unfair,' and 'indecent,' and the language is not always limited to such printable terms. The charge is earnestly made by some labor members that the carrier representatives are deliberately attempting to obstruct the Board's business for the purpose of carrying out a carefully formulated design to destroy the Board, and carrier members charge the labor representatives with bad faith in asserting unreasonable claims.

"This spirit of intense antagonism and bitterness is not always kept within the bounds of personal relations among the Board members themselves. On some occasions it has had its effect upon referees. *It is a well-known fact confirmed by both sides that in at least one instance labor members of the Board heaped such severe personal abuse upon a referee who was thought to be about to decide in favor of carriers that the referee could not endure further unpleasantness and resigned without deciding the cases before him.*" (Emphasis supplied.)

Clearly, this is not the atmosphere of an administrative body of experts employed in determining technical and intricate matters of fact through the exercise of wise and impartial administrative discretion. It is equally clear that the members of the Board themselves are not experts of that character and that they do not maintain the attitude of impartial inquiry and analysis essential to expert determinations. On the contrary, their approach to the problems which they are called upon to decide is illustrated by the following statement of a member of Division I (Compilation, pp. 338-39):

"Now, I want to take up the question of writing an opinion with the decisions. I wonder why the railroads after forty years—maybe not quite so long; it has not been that long—but I wonder why they want a lengthy opinion.

"* * * Now all of a sudden they want a long opinion from the First Division. And with the labor members tough * * * we are tough when we try to get what is right for the men, but we are friendly when we walk out of the Board. But we labor members have found this, that the carrier members then existing, one or two of them that came from the Third Division to our Division, on carrying into effect that policy, evidently convinced all carriers that that is a good way to delay arriving at decisions of cases—and the railroads don't want these cases decided, because we are over 3,000 behind now, and they think, like a lawyer who has a bad case, that maybe something will happen and they won't have to pay. I say that. I make that charge. * * *

"But finally—finally this mess of trying to prepare some rules of procedure. For what? We don't need rules of procedure. What we need is a little cooperation from the railroads, a little help from them, to tell their representatives to cooperate with us, to make this law work, tell them not to be afraid to go into a room with a labor representative and talk about a case. You can't get them in a room by themselves. They must be all together. * * *

"It is not rules of procedure. Rules of procedure will delay you. And the people that started the rules of procedure started them to prevent them from having to face the issue of deciding a case. That is a fact. I know."

In spite of the complaint often made that the Adjustment Board does not function, or does not function rapidly

enough, because of the friction between its bipartisan elements, the published annual reports of the Adjustment Board* and of the National Mediation Board* nevertheless show that the Adjustment Board as a whole, and especially its First Division, has made awards in an extraordinarily large number of cases and often with unusual rapidity. Thus one member of that Division stated that on one occasion the Division "disposed of hearings in 67 cases in one day. * * * Another day we nearly topped that record" (Compilation, pp. 190-91). This record is certainly high, compared with that of a body like the Interstate Commerce Commission, and if there is ground for inference one way or the other, it would appear from the number of cases decided by the Adjustment Board over a given interval that its decisions apparently do not receive such careful study and consideration as do cases decided by the Commission.

Finally, in further support of the petitioner's contention that the decisions of the Adjustment Board do not proceed from the informed judgments of a continuing body of experts, it is to be noted that many of these decisions, and undoubtedly all the most hotly contested ones, are not made by the Adjustment Board itself, but by an outside referee called in *ad hoc* for the decision of a specific lot of cases.

In the instances where decisions of the Adjustment Board are made through referees, the latter are not permanent or continuing officials. Under the present system temporary referees are assigned from time to time to a Division of the Board to decide accumulations of deadlocked cases. These referees are designated by the National Mediation Board from outside lawyers, judges or professors, and are paid on a *per diem* basis—orig-

*The designation of these reports is, "Anual Report of the National Mediation Board, Including the Report of the National Railroad Adjustment Board."

inally $75, now $50, per day.* The published reports of the awards of the First Division of the Adjustment Board show that down to October 31, 1942, 2,875 or approximately 39% of all its decisions,† had been made through referees, and that for this purpose 29 referees had been employed. The reports also show that it is not the practice to employ the same outside referees continuously, but that a particular referee may be called in to decide a batch of cases in a given year and may not be employed thereafter. This is shown by the following tabulation from the Annual Reports of the National Mediation Board, listing the names of referees serving with the First Division of the Adjustment Board, by years, and the number of days of service in each respective year:

*1935*

Thos. M. Fennell.....March 10-30, April 1-15
Frank M. Swacker.....May 9-31, June 1-8

*1936*

R. G. Corwin.....101 days
F. P. Douglass..... 41 days
W. E. Morse..... 26 days
W. H. Spencer..... 12 days

*1937*

Frank P. Douglass..... 60 days
Lloyd K. Garrison..... 31 days
Isaiah L. Scharfman..... 38¼ days
William H. Spencer..... 48 days

* See Compilation, p. 106, and Sixth Annual Report of the National Mediation Board (1940), p. 37.

† The total number of decisions rendered by the First Division of the Adjustment Board up to and including October 31, 1942, was 7,442, according to the published reports of its awards.

*1938*

John A. Lapp..... 22 days approximately*
Arthur M. Millard..... 58 days*
Isaiah L. Scharfman..... 7 days*
George W. Stocking..... 35 days*
Frank M. Swacker..... 41 days*

*1939*

Hammond E. Chaffetz... 22 days
John A. Lapp.....136½ days
Frank M. Swacker.....113¾ days

*1940*

Dexter M. Keezer..... 51¾ days
Richard F. Mitchell..... 15¼ days
Paul W. Richards..... 28½ days
Royal A. Stone..... 10 days
Frank M. Swacker.....280¾ days

*1941*

Edward F. Carter..... 59 days
Fred L. Fox..... 20 days
Benjamin Hilliard..... 56 days
Thos. F. McAllister..... 3 days
Richard F. Mitchell..... 90 days
Paul W. Richards.....108 days
Robert G. Simmons..... 54 days
St. Clair Smith..... 45½ days
Royal A. Stone..... 23½ days
Frank M. Swacker..... 6¼ days
Jas. H. Wolfe..... 48 days
John C. Young.....121 days

*In the report for 1938 the number of days is not specifically given and can only be approximated by taking the total compensation, which is given, and dividing it by $75. This may not be strictly accurate, as the compensation figure may include items of expenses.

*1942*

| | |
|---|---|
| Bruce Blake | 26½ days |
| Leif Erickson | 63½ days |
| Fred L. Fox | 22 days |
| Howard A. Johnson | 71¾ days |
| Thomas J. Mabry | 114 days |
| Richard F. Mitchell | 7 days |
| James B. Riley | 68¾ days |
| Herbert B. Rudolph | 64 days |
| Robert G. Simmons | 52 days |
| St. Clair Smith | 3½ days |
| James H. Wolfe | 23 days |
| John C. Young | 22 days |

This tabulation shows that, of 29 referees employed on the First Division during the years 1935-42, inclusive, 17 were employed in only one of the yearly periods, 10 were employed in two years, one was employed in three years, and in only one case, that of Frank M. Swacker, was a referee employed in more than three of the eight yearly periods. Moreover, with the single exception of Swacker, none of the referees employed on the First Division in the first five years, from 1935 to 1939, was employed on that Division in any of the last three years, from 1940 to 1942.

Examination of the statistics given in the Annual Reports with reference to the referees employed on all Divisions of the Adjustment Board during the years 1935 to 1942, inclusive, shows that there was a total of forty-seven referees employed on all the Divisions in that period, and that, of that total, twenty-two were employed in only one of the yearly periods, fifteen were employed in only two years, four were employed in three years, and only six were employed in more than three of the eight yearly periods.

Clearly, on the basis of these statistics, the conclusion is inescapable that the referees employed on the various

Divisions of the Adjustment Board cannot in any sense be regarded as continuing experts. Furthermore, these Annual Reports show that practically all the referees have been judges, lawyers, or professors having no special experience or expert competence with respect to the business of operating railroads, or with respect to the terminology of railroad operation (see, for example, the following Annual Reports of the National Mediation Board: Report for 1936, p. 34; Report for 1939, p. 29; Report for 1940, p. 32; Report for 1941, p. 46; Report for 1942, pp. 46-47).

(c) *The Questions "Decided" by the Adjustment Board are not of the Kind to Which the Primary Jurisdiction Doctrine is Applicable Under the Decisions of This Court, Since the Adjustment Board is not in Any Sense a "Fact-finding" Body, and Its Conclusions are not Reached as a Result of Weighing and Considering Evidence.*

In *Gt. No. Ry.* v. *Merchants Elevator Co., supra,* this Court, speaking through Mr. Justice Brandeis, undertook to distinguish the kind of questions which may not be submitted to the courts for determination without prior recourse to the primary jurisdiction of an administrative tribunal like the Interstate Commerce Commission, from the different kind of questions with respect to which preliminary recourse to the administrative tribunal is not required. The distinction is indicated in the following language from the opinion (p. 294 of 259 U. S.):

> *"Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion.* The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. *That operation was solely one of construction; and pre-*

*liminary resort to the Commission was, therefore, unnecessary.*" (Emphasis supplied.)

And again (pp. 291-92 of 259 U. S.):

"• • • what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

"When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. *Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact.* Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established. *But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court*

*take jurisdiction of the controversy.* If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained." (Emphasis supplied.)

In other words, the primary jurisdiction doctrine applies where the question in dispute is of such a character that it necessarily rests upon the determination of some specialized question of fact, and where the procedure of the administrative tribunal is available to determine that question of fact.

Neither of these conditions is present in the case at bar, or in the class of controversies generally with respect to which the National Railroad Adjustment Board is authorized to act. Those controversies are treated by the Adjustment Board as purely and essentially matters of verbal interpretation rather than of fact-finding, and the Adjustment Board is in no sense a fact-finding body, nor is it equipped to make fact-determinations. Indeed, by its rules of procedure the Board has totally incapacitated itself to reach conclusions of fact, because it does not receive evidence, does not permit cross-examination, and, in short, does not employ any of the procedure or make any of the investigations which are prerequisite to trustworthy conclusions of fact.

It is a well-known feature of the procedure of the First Division of the Board that in accordance with its resolution of April 27, 1937, "introduction of evidence at the hearing is foreclosed" (R. 43). At the so-called "hearing" no witnesses are called to testify and no evidence is introduced as to the facts relied on by the parties; contentions are advanced wholly on the basis of *ex parte* allegations which are received by the Division without any opportunity to the parties for cross-examination or other means of testing the truth of the allegations (Complaint, Pars. 22-23; R. 8-9). Finally, the award of the Division contains nothing that in any proper sense can

be described as findings of fact (see so-called "findings" in present case, Complaint, Par. 26; R. 9).

This procedure has been defended on the ground that the Adjustment Board has no proper occasion or need to decide disputed questions of fact. The peculiarity of the procedure was discussed at length during the investigation by the Attorney General's Committee on Administrative Procedure and elicited the following sympathetic explanation from an investigator for that Committee (Compilation, pp. 101-2):

> "*The Board has no power to subpoena witnesses and it simply does not permit testimony of witnesses.* This is true for several reasons. In the first place, *ninety-five per cent of the cases involve no pivotal disputes of fact which cannot easily be resolved.* In the second place, the file of the case which has grown 'on the property' usually exhaustively deals with fact questions and from that file the Board members can usually gain a sufficient understanding of such few factual disputes as arise. Thirdly, witnesses could not conveniently be brought from all parts of the country to Chicago where the hearings are conducted. Fourthly, to permit testimony would probably mean attempting to apply some kind of rules of evidence and to prepare transcripts, and legal talent with all its contributions of complexity and technicality would be drawn into the picture. Fifthly, so long as the Board is bi-partisan in character it probably could not successfully wield the subpoena power. The labor members would no doubt want to subpoena a number of railroad presidents in little cases and to subpoena documents which would satisfy their curiosity about railroad management, but would contribute little to the decision of controversies. The carrier members likewise would tend to require disclosure of union secrets. * * *

"What accounts for the overwhelming opinion in favor of a system of deciding on the basis of hearsay without cross-examination? No doubt the realization that *the real function of the Board is to decide questions of interpretation and application of agreements, instead of mere factual disputes,* is an exceedingly important factor in the thinking of all concerned. *The real issues that count are issues of interpretation and not issues of fact.* Whether or not John Smith has been guilty of some infraction of rules is not very important to either the unions or the railroads, but whether or not the Board should require his reinstatement upon the theory that discharge for one such offense is too severe a penalty is a question which is of consequence to both unions and railroads." (Emphasis supplied.)

In short, from the foregoing summary it seems clear that the Adjustment Board fails to do, and is indeed disabled by its own procedure from doing, the very thing which under the holding of the *Merchants Elevator* case would bring the doctrine of primary jurisdiction into play. The Adjustment Board, for good or bad reasons, is entirely without the power and facilities for making the kind of investigation which is essential to the determination of complicated questions of fact—the sort of fact questions which under the principle of the *Merchants Elevator* case would afford ground for requiring preliminary resort to an administrative body. The Adjustment Board does not undertake to make such determinations, and may in effect be said to be intentionally so organized as to prevent it from making them. The Board confines itself to the interpretation of the agreements in the abstract, without recourse to the factual aids which a court of law would necessarily draw to its assistance. There would, therefore, be no utility whatever in requiring preliminary resort to the Adjustment Board on the doc-

trine of the *Abilene Oil* case, because the Board does not perform, and is incapable of performing, the function which that doctrine singles out for performance by the administrative body.

From all of the above considerations it follows that the primary jurisdiction doctrine has no application with respect to the National Railroad Adjustment Board, since the reasons on which that doctrine is founded do not exist in the case of the Adjustment Board.

**C. To Overrule the Moore Case and Hold that Rail Carriers and Their Employes May not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure of the Railway Labor Act Would Mean in Substance that the 1934 Amendments to the Railway Labor Act Must be Construed as Effecting a Complete and Radical Change in the Character and Legal Effect of the Adjustment Procedure for Handling Railway Labor Disputes, in the Face of an Entire Absence of Anything in the Legislative History of the Act to Show that Congress Intended Such a Result, and Despite the Fact that the Legislative History of the Act Distinctly Shows the Contrary and that Such a Construction Would Lead to Results so Unreasonable and Arbitrary That the Construction Ought not to be Adopted Since not Shown to be Required by the Intent of Congress.**

For this Court now to overrule the *Moore* case and hold that neither party to a dispute over which the Adjustment Board has authority may have recourse to the courts before submission of the dispute to the Board would have the effect of holding, as this Court has in effect said, that the adjustment "machinery provided for settling disputes was based on a philosophy of legal compulsion": *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, at p. 635. This Court held otherwise in that case, saying through Mr. Justice Black (pp. 634-6 of 312 U. S.):

"*But we find nothing in that Act which purports* to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or *to make an administrative finding a prerequisite to filing a suit in court.* * * * It is to be noted that the section pointed out, §153 (i), as amended in 1934, provides no more than that disputes '*may* be referred * * * to the * * * Adjustment Board * * *.' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *.' *This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose.* For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, *the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature.* The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." (Emphasis supplied.)

Thus, this Court held in that case that neither the language of the Act nor its legislative history indicated that anything more was intended by Congress than the establishment of a voluntary method of adjustment to which the parties could resort if they chose and which did not displace the ordinary jurisdiction of the courts

to adjudicate the dispute without prior submission to the Board. Reexamination of the Act in the light of its legislative history shows that this Court's conclusion in that respect in the *Moore* case was correct.

1. The Legislative History of the 1934 Amendments to the Railway Labor Act not Merely Shows an Entire Absence of any Congressional Intent to Effectuate Such a Radical Change in the Policy of the Act as Would be Involved in Holding That Under the Act in its Present Form Rail Carriers and Their Employes may not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure, but in Fact Shows a Contrary Intent on the Part of Congress, viz., an Intent not to Change the Policy of the Act.

The conclusion reached and set forth by this Court in the language above quoted from the opinion in the *Moore* case is fully confirmed by the legislative history of the Adjustment Board provisions of the Railway Labor Act of 1934. The fact that by those provisions Congress effected certain modifications in the permissive procedure already embodied in the Transportation Act of 1920 and the Railway Labor Act of 1926 for the informal adjustment of disputes between carriers and their employes affords no basis whatever for a conclusion that it thereby intended to make judicial procedure for the determination of those disputes unavailable either *ab initio* or otherwise. That the only object of Congress was to make such permissive machinery for informal adjustment more readily available and more useful is clearly stated in the following language from the Report of the Committee of the House of Representatives on Interstate and Foreign Commerce, in recommending for enactment the amendments of 1934 to the Railway Labor Act (House Report No. 1944, 73rd Congress, Second Session, pp. 2-3):

"*The bill does not introduce any new principles into the existing Railway Labor Act,* but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect."

* * * * * * *

"The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives."

* * * * * * *

"The second major purpose of the bill is to provide sufficient and effective means for the settlement of minor disputes known as 'grievances', which develop from the interpretation and/or application of the contracts between labor unions and the carriers, fixing wages and working conditions. * * * This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties." (Emphasis supplied.)

Certainly this language neither expresses nor implies any disparagement of the judicial process as applied to railway labor disputes. The most that the language can be made to mean is that the settlement of controversies by compromise or "adjustment" may be desirable, and that facilities should accordingly be provided therefor.

It says nothing, and implies nothing, that would limit the right to a judicial determination of legal issues which the parties are unable or unwilling to settle informally. The two processes, of informal adjustment on the one hand and legal determination on the other hand, had already long been recognized as separately and alternatively available at the time when the 1934 amendments to the then existing Railway Labor Act were adopted. Adjustment boards in one form or another had been a feature of labor relations in the railroad industry since the last war. Between 1920 and 1926 functions of this character had been vested in the so-called Railway Labor Board established under Title III of the Transportation Act of 1920. Speaking of these functions and of their essentially different character from the judicial determination of a controversy, this Court expressed itself as follows in *Penna. R. R.* v. *Labor Board*, 261 U. S. 72, 43 S. Ct. 278 (1923), at p. 84:

> "Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employes, or to enforce or protect them. *Courts can do that.* The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. *It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law.*" (Emphasis supplied.)

In the language just quoted this Court recognized and emphasized that there is a useful and important function to be performed in facilitating voluntary compromises and settlements between employes and employers, but that this is a different function from the adjudication and protection of legal rights. As the quoted passage points out, the protection of legal rights is the function of courts and not of the agency of adjustment. The fact that an agency of adjustment is established cannot, therefore, be

construed as indicating any intention on the part of Congress to preclude resort to the courts and thereby prevent the enforcement and protection of legal rights.

There is nothing in the legislative history of the Railway Labor Act of 1934 to indicate that Congress thought it was effecting any revolution in its previous policy. In fact the House Committee in its report specifically stated that "The bill"—*i. e.*, the bill which afterwards became the 1934 Railway Labor Act—"does not introduce any new principles into the existing Railway Labor Act." (House Report No. 1944, 73rd Congress, Second Session, p. 2.) On the contrary, it is clear from the Reports of both the Senate and House Committees* that the provisions of the present Act establishing the National Railroad Adjustment Board were designed simply to correct certain supposed defects in the provisions of the Act of 1926, including defects in the operation of the adjustment machinery. The Act of 1926 contained a provision which purported to require the carriers and their employes to establish an adjustment board or adjustment boards by agreement; but, since alternatives were left open to permit the establishment of separate boards for each carrier or of regional boards or a single national board, the boards which were actually established covered only a portion of the nation's railroad system. Furthermore, the Act provided no effective method of handling cases to a conclusion where the members of a Board disagreed and a deadlock resulted.

It was for the purpose of meeting these supposed defects in the Act of 1926 that the Act of 1934 was enacted, according to the Report of the House Committee. Thus, that report states (House Report No. 1944, 73rd Congress, Second Session, p. 3):

> "The present Railway Labor Act provides for the establishment of boards of adjustment by agreement.

* House Report No. 1944 and Senate Report No. 1065, 73rd Congress, Second Session.

In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the board.

"* * * the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. * * * This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. The provisions as to the national board of adjustment are as follows: * * *

"(g) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person; and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a majority decision reached."

These were the principal and apparently the only changes which Congress had in mind in substituting the adjustment board provisions of the Act of 1934 for the adjustment board provisions of the Act of 1926. It is significant that there appeared no intention whatever to affect or alter the provisions defining the nature and functions of adjustment boards. The present Act establishes a National Board, since none had been established by agreement under the Act of 1926, but it still permits a carrier and its employes, or a group of carriers and their employes, to establish separate adjustment boards by voluntary agreement (Railway Labor Act of 1934,

Section 3 Second) if they so desire, and where such a separate board is in existence, the National Board has no functions with reference to the disputes which are submitted to the separate board.

The language of the Railway Labor Act of 1934 describing the functions of the National Railroad Adjustment Board (Section 3 First (i)) is borrowed practically verbatim from the language of Section 3 First (c) of the Act of 1926, with the single important difference that, whereas the Act of 1926 provided that, when an adjustment board had been set up by agreement, disputes "shall" be referred to the board, the Act of 1934, in referring to the statutory board, substitutes the permissive word "may." It is clear from the complete parallelism of the pertinent provisions of the present Act and of the Act of 1926 that the functions and status of adjustment boards under the present Act were intended by Congress to be identical with the functions and status of adjustment boards under the 1926 Act, and there is no basis whatever for a suggestion that under either Act there was any intention to substitute adjustment boards for the courts or to require preliminary resort to an adjustment board as a prerequisite of recourse to the courts.

It is clear, therefore, that Congress did not intend by the 1934 amendments to the Railway Labor Act to give to the adjustment procedure for the settlement of railway labor disputes any effect or status different from that which that procedure had previously had, and it is also clear that prior to the 1934 Act the adjustment procedure had not held such a status that preliminary resort thereto was a condition prerequisite to the right to bring a judicial proceeding in the courts. Not merely is there no evidence whatever of an intention on the part of Congress to make any change in this respect in the status of the adjustment procedure, but there is the strongest evidence of an express contrary intent, *i. e.*, an intent not to make any such change, in the statement quoted above from the

House Committee's Report to the effect that "The bill" —*i. e.*, the Railway Labor Act of 1934—"does not introduce any new principles into the existing Railway Labor Act." Accordingly, it seems proved conclusively that to construe the Act of 1934 so as to require that the *Moore* case be overruled would be to fly directly in the face of the legislative history of that Act and to affirm a Congressional intent which that history expressly denies.

2. A Congressional Intent to Require That Rail Carriers and Their Employes May not Have Access to the Courts Without Preliminary Resort to the Special Statutory Adjustment Procedure Ought Not to be Supposed or Implied in the Absence of a Clear Expression of Such Intent, in View of the Fact That Such a Requirement Would Lead to Unreasonable and Arbitrary Results.

Another obstacle to the adoption of a construction of the Act which would require preliminary resort to the adjustment procedure before access to the courts is that it would lead to arbitrary and unreasonable consequences which ought to be avoided in the absence of the clearest kind of showing that they are required by the intent of Congress. The consequences would be arbitrary and unreasonable, because they would amount to ousting the procedure of the courts in favor of a procedure which is not merely as far removed as possible from anything that can be called judicial in character, but which is not in any sense quasi-judicial or even administrative. Some of the peculiarities of that procedure have already been referred to above. Others are equally striking.

(*a*) The first of these is that in the procedure before the Adjustment Board the carrier is required to answer the claim of the employe or employes without seeing the "submission"—*i. e.*, the statement of the claimant's position as presented to the Board—and thus without having

notice of the specific nature and basis of the claim as presented. This practice has been discussed as follows by a representative of the Attorney General's Committee on Administrative Procedure (Compilation, pp. 97-98):

"After the notice [of the claim] is given to the carrier, the parties have thirty days to make their submissions, and normally the submissions will come in from both sides about simultaneously near the end of the thirty-day period. *A submission of a carrier is not in the nature of an answer because it is made without knowledge of the consent of the union's submission.* As a result it sometimes happens that the carrier's submission deals with some aspects of the controversy not raised in the union's submission or that it otherwise misses somewhat the particular contention advanced by the union. *With simultaneous statements from both sides, therefore, the issues are not always clearly demarcated.* Of course, the carrier is not taken by surprise because the statute requires that before a case may be submitted to the Board, the parties must have negotiated and attempted on the property of the carrier to settle or adjust the dispute, and all cases which come to the Board have wound their way up through the hierarchy of union and railroad officials. By the time the case reaches the Board enough negotiation has been carried on that parties on both sides understand the contentions of the other side. *Despite this fact, however, it is still possible by changes in emphasis or by elimination of some contentions to alter somewhat the nature of the claim and it may be reasonably argued that something would be gained by requiring that the union's submission be made first, so that the carrier's submission could be in answer to the union's admitting, denying, and offering affirmative defenses to the specific allegations made in the union's submission. The labor members of the Board, however, object to*

*such a practice on the ground that for the union to make its submission first would give an unfair advantage to the carriers because the union would disclose its case first.*" (Emphasis supplied.)

The author adds in a footnote (Compilation, p. 98):

> "This position of the labor members may not be wholly consistent with their argument that the carriers are fully informed about all aspects of each case by reason of negotiation on the property."

The author also refers (p. 98) to the fact that "Amendments to submissions are made only with the consent of the opposing party."

(*b*) Reference has already been made to the fact that at the "hearing" before the Adjustment Board Division the introduction of evidence is expressly prohibited. Accordingly, what is called "evidence" is incorporated in the "submissions." These are a medley of argument, citation, allegations and supposedly evidentiary material, such as documents and occasional affidavits. In the words of the commentator referred to above, the submissions "consist of evidence, exhibits, arguments and authorities, as well as mere allegations of fact and prayers for relief" (Compilation, p. 98). The commentator describes the hearing before the Board as follows (Compilation, p. 99):

> "Under the original rules the parties come to the hearing without having had opportunity to examine their opponent's submission. Each division, however, has since agreed to permit its Secretary to supply to each party the submission of the other party. The agreement of Division I to this effect was made June 18, 1935, and by its terms expired January 1, 1936. However, it has from time to time been renewed; the present arrangement terminates July 1, 1940, 'unless extended by majority vote of the full membership of the First Division.'

"Before the time for hearing, each party prepares his rebuttal, which takes the form of what is described in all divisions as 'written oral argument.' These arguments are exchanged by the parties in advance of the hearings in Division I and II, but not in Division III. That the practice of Divisions I and II seems preferable is quite unimportant; the important question is what the opposing factions of each division are willing to agree to.

"*The hearing is little more than a reading contest.* Sometimes it is a very, very long reading contest. The employee's representative first reads his submission, then the carrier's representative reads his submission, then the employee's representative reads his 'written oral argument,' and finally the carrier's representative reads his 'written oral argument.' Occasionally, but not usually, the parties agreed to 'stand on the record' and read orally neither the submissions nor the arguments. *This process of oral reading of what has already been reduced to writing is wholly indefensible. Occasionally, in the course of the reading there may be some interpolation by way of explanation or impromptu remarks, but the extent of this is always negligible.* During the reading the Board members customarily do not interrupt with questions, but reserve any questions that may arise until the reading is finished. Board members on both sides recognize that the oral reading is a waste of time. *They have copies of the submissions and the arguments before them and during the reading nearly every Board member will be reading his own copy (or documents in some other matter) and not listening to the oral presentation. In one instance a whole submission on one side had been read in a different case from that which was before the Board and none of the ten Board members who were purporting to listen noticed the discrepancy.* The only defense suggested

> for the practice is the desire of the parties to make sure that the submissions and arguments come to the attention of the Board members, for it is said that the parties fear that unless the oral reading contests are held, the submissions and arguments may be ignored by some Board members." (Emphasis supplied.)

The author adds in a footnote:

> "Even though Board members do not listen to oral readings, still the practice might be defended on the ground that during the reading contests Board members, having nothing better to do, will themselves read the papers which they might otherwise ignore." (Compilation, p. 100.)

It may be observed that the reason why the "hearings" have become mere reading contests is because of insistence on the part of one element of the Board that nothing shall be placed before the Board which is not contained in the submissions. This principle, applied in a technical spirit, necessarily limits the hearing to a verbatim reading of the submissions.

It has been a subject of intense controversy before the First Division whether the parties should be permitted to read or even file with the Board the "written oral arguments" prepared by each party after seeing the submission of the other, and which are the only documents in the nature of an answer that the Board's practice permits. The rule of the First Division allowing the filing of these "written oral arguments" has expired and has not been renewed because of a deadlock. This was the deadlock which led to the application for an opinion of the Attorney General, already referred to at page 49 above. Since the Attorney General has held that a referee could not be appointed to break a deadlock on a question of adopting rules of procedure, it is

not now permitted in the First Division for either party to file or present anything in the nature of an answer to the contentions and allegations of the opposite party. The case thus stands for decision purely on the original "submission" papers, which, as indicated above, may not be directly responsive to each other.

(*c*) After a case has been "heard" by a Division, the subsequent procedure is described as follows (Compilation, p. 104):

> "The cases are heard in groups. The Board does not follow each case through to a decision, but instead will listen to oral presentations in one case and then immediately listen to oral presentations in the next case. When the division meets in executive session for deliberation and voting, it usually will have a large group of cases before it. Out of each group of cases a number will normally be deadlocked. The deadlock cases are 'held in the cooler' for the ten-day period, during which time the division theoretically attempts to agree upon a referee. In Division II the Board members choose a referee within the ten-day period, but in Divisions I and III they assume that they cannot do so and customarily do not even go through the motions of making the attempt. During this waiting period, as a result of the processes of negotiation and bargaining between the two factions, a portion of the deadlocked cases are normally withdrawn from the group which are finally certified to the Mediation Board."

Division I of the Adjustment Board does not permit the parties to make any appearance or argument before the referee, or even to file briefs for his consideration. "On the questions of briefs in Division III and of both oral arguments and briefs in Division I deadlocks persist, with the carrier members voting in favor of according

the privileges, and labor members voting against. As a result of the deadlocks, the privileges are denied, although in the absence of a majority vote no affirmative ruling to that effect is possible" (Compilation, p. 104). Accordingly, the referee hears the case solely as presented to him by the two factions of the division. "The members of the Board on each side become advocates in behalf of the parties for presenting the cases to the referees" (Compilation, p. 105). The referee also has before him the "submissions" of the two parties and the "written oral arguments" where these are permitted to be filed.* On the basis of these materials and the presentation made to him by the Board members, he decides the case, and occasionally, but very seldom, writes an opinion.

(*d*) Usually the determination of the dispute takes the form of a series of very brief "findings," such as those reproduced at page 42 of the "Compilation" from Award No. 1878 of the First Division. These "findings" and the award based thereon are in the following language:

> "*Findings:* The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:
>
> "The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> "The parties to said dispute were given due notice of hearing thereon.

*This is no longer true in Division I, since the expiration, referred to above, of the rule permitting "written oral arguments" in that Division. Accordingly, in cases before that Division the referee now has before him no paper constituting an answer by the employer to employes' original submission.

"Claim is supported by the rules.

"AWARD

"Claim sustained."

Of this character were the findings and award involved in the case at bar and reproduced in the Record (R. 54) as follows:

"*Findings:* The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The work described in this docket is within the jurisdiction of the men holding seniority exclusively on the rails of the Washington Terminal Company.

"AWARD

"Claim sustained."

Obviously, these so-called "findings" are not findings of fact in the normal and usual sense of that term. They are entirely formalistic and disclose nothing as to the Board's detailed views with respect to the specific issues of fact involved in the dispute.

In considering the foregoing procedure, the question may well suggest itself as to what opportunity it really offers for the kind of informal "adjustments" and compromises which, in accordance with the Congressional intent, are the object of the procedure. In fact, the whole procedure seems to be unusually rigid and formalistic, while at the same time affording no proper opportunity

for a presentation and argument of the controversy on the law and the evidence. What at least does seem clear is that the procedure is not in any sense adapted to provide, and does not in any way provide, an opportunity to prove facts, such as the customs and practices prevailing on particular railroad properties and in the light of which the rules and agreements applicable to those properties should properly be interpreted. Certainly such procedure does not afford anything that could properly be regarded as a substitute for a judicial or quasi-judicial hearing, or which could lay the foundation for a legal determination of the rights of the parties.

Since the adjustment procedure thus provides no means appropriate for a determination of the legal rights of the parties and, as shown above, was not intended by Congress to provide means for .that purpose, it would be plainly unreasonable and arbitrary to hold, in the absence of the clearest expression of Congressional intent, that the parties should be precluded from a determination of their legal rights before seeking and obtaining an award which is thus not designed and adapted to prepare for or establish a determination of those legal rights but is aimed at another objective. Here again there is the sharpest kind of distinction between the adjustment procedure, on the one hand, and the procedure of the Interstate Commerce Commission to which the primary jurisdiction doctrine is applicable, on the other hand. In the case of the Interstate Commerce Commission the procedure of that body, to which resort must be had before access is available to the courts under the primary jurisdiction doctrine, is in every sense quasi-judicial procedure and is directed as fully as is the procedure of the courts toward determining the parties' legal rights. Thus the Commission's determination once made becomes available as a stage in the ultimate judicial determination of the controversy. Obviously this is not true in the case of a

determination made by the Adjustment Board, which is neither judicial nor quasi-judicial, and is aimed not at clarifying or determining the parties' legal rights but at another and different purpose. To hold that the parties, as a condition of obtaining determination of their legal rights, must first resort to such a non-judicial procedure, which is avowedly not designed to result in a determination of their rights, would be a result so unusual and unreasonable that clearly it should not be adopted in the absence of an unmistakable Congressional expression of intention. That the Congressional intention is to the opposite effect is shown by the legislative history of the Act, reviewed above (pp. 64-70).

**D. The Question Whether or not the Moore Case Should be Overruled is not Directly Involved in the Case at Bar, Which Concerns the Employer's Right of Access to the Courts After the Adjustment Procedure Has Been Invoked and Pursued to a Conclusion by the Employe; But, If the Moore Case was Rightly Decided and If Its Reasoning is Correct, Then, Since the Adjustment Procedure is One Through Which the Parties Do not and Cannot Obtain a Judicial Determination of Their Contract Rights, Either Party Must Be Entitled to Such a Determination in the Courts After the Adjustment Procedure Has Been Pursued by the Other Party.**

The foregoing discussion has been in response to the first part of the first question propounded by this Court, and has been addressed to the question whether or not a party to a dispute of the kind over which the National Railroad Adjustment Board has authority may invoke the jurisdiction of the judicial courts with respect to such dispute *before* resorting, in the first instance, to the Adjustment Board. The *Moore* case decided that question in the affirmative, and it has been the purpose of the present

section of this brief to show that the *Moore* case was rightly decided.

However, the point decided by the *Moore* case does not of course dispose of the issue presented in the case at bar—it merely contributes a preliminary step in the reasoning pertinent to a determination of the question which the Court is here called upon to decide. In the case at bar this Court is called upon to decide whether or not an employer has a right of access to the courts for the judicial determination of its contract rights with its employes *after* the adjustment procedure has been invoked and pursued to a conclusion before the Adjustment Board by the employes.

What bearing on this latter question is given by the answer to the problem presented in the *Moore* case? In other words, assuming that the *Moore* case was correctly decided and that, before submission of a dispute to the Adjustment Board, either party may invoke the jurisdiction of a court, what follows from that conclusion with respect to the right of access to the courts by one party after the other has chosen to pursue the adjustment procedure, and has pursued that procedure to a conclusion, before the Adjustment Board?

It will be the purpose of the following sections of this brief to contend, on a number of grounds which will hereafter be developed, that, because of the nature and functions of the adjustment procedure, where an employe has invoked that procedure and has obtained a so-called award from the Adjustment Board, the employer is not thereby barred from resort to the courts. Petitioner submits that one of the grounds supporting and confirming this conclusion is supplied by this Court's decision in the *Moore* case and by the theory and conception of the adjustment procedure on which that decision is founded. For if the *Moore* case was rightly decided, two consequences follow. One is that the statutory adjustment procedure of the Railway Labor Act is not in any sense a compulsory or

an exclusive procedure. The second is that, as pointed out by this Court in its opinion in that case, the adjustment procedure is not a method of determining the party's legal rights, but is merely a "system of peaceful adjustment and mediation."

Both these consequences require the conclusion that the unilateral act of one party in setting the adjustment procedure in motion should not operate to bar access by the other party to the courts. Clearly, the fact that one party to a contract, namely the employe, chooses to resort to a procedure which by its nature is not designed or adapted to determine the legal rights of the parties should not be held to have the effect of thereby barring the other party from recourse to a court, which is the only tribunal where such a determination of its legal rights can be obtained. In view of the nature of the adjustment procedure, as fully recognized in the *Moore* case, it follows that if one of the parties, by resorting to that procedure, can in effect make it exclusive as against the other, so as thereafter to bar that other from the courts, then the former will in effect be able to deprive the latter of an opportunity for a judicial determination of its rights. Accordingly, the decision of this Court in the *Moore* case and the philosophy upon which that decision is founded require that the question whether the employer has a right of access to the courts after the adjustment procedure has been invoked by the employe, must be answered in the affirmative.

This follows *a fortiori* from the fact that, in view of the way in which the adjustment procedure is set up and operates, the issuance of an award by the Board can be brought about by the purely unilateral action of one party to the contract, as will be shown in the following section.

## SECTION II.

### (Answer to the Court's Second Question.)

UNDER THE RAILWAY LABOR ACT THE ADJUSTMENT BOARD MAY AND IN FACT DOES MAKE AN AWARD EX PARTE IF ONE PARTY TO THE DISPUTE DOES NOT APPEAR BEFORE THE BOARD, AND SUCH AWARD IS GIVEN THE SAME EFFECT AS AN AWARD MADE BY THE BOARD AFTER BOTH PARTIES HAVE APPEARED.

The second question put by this Court in its order of November 16, 1942, is as follows:

> "2. Whether the Board may make an award ex parte if one party to the dispute does not appear before the Board, and if so the effect given by the statute to such an award."

Before proceeding to answer this question it will be appropriate to discuss its significance and bearing on the central issue involved in the case at bar, viz., whether or not, after the employes have invoked the adjustment procedure, the employer is barred from access to the courts.

### A. Significance of the Court's Second Question.

The second question propounded by the Court and reproduced above is relevant to the petitioner's argument in the following way:

Assuming that the *Moore* case was rightly decided, the contention might conceivably be advanced that, even though the parties have access to the courts before there has been resort to the adjustment procedure, nevertheless their right to such access ceases when the adjustment procedure has once been invoked. Of course the answer to this contention is the one made at the close of the previous section of this brief, namely, that such a

contention would mean that the employe by invoking the adjustment procedure could by his unilateral act bar the employer from a judicial determination of its rights—a result clearly unreasonable and arbitrary. This answer, however, raises the question whether it is in fact true that the adjustment procedure can be set in motion and pursued to a conclusion by the unilateral act of the employe and without the consent and participation of both parties. If not, and if the participation of the employer is essential to the making of an award by the Adjustment Board, then there might be ground for contending that, if such an award does operate to bar the employer from access to the courts, the employer has no cause of complaint since it might be said that by having participated in the proceedings before the Board the employer has voluntarily forfeited its right to resort subsequently to the courts.* On the other hand, if the Adjustment Board is authorized to and does make awards in cases where one of the parties does not participate and does not appear before the Board, then it may not be said that the employer by appearing before the Board and participating in its proceedings has in any sense voluntarily chosen the adjustment procedure of the Board for the determination of the dispute or has voluntarily forfeited its right to resort subsequently to the courts.

Accordingly, it becomes relevant to inquire whether the Adjustment Board may make an award if one party to the dispute does not appear before it, and if so what is the legal effect of such an award.

**B. The Adjustment Board Has and Exercises Authority to Determine and Issue Awards in Disputes Submitted to It by One Party Without the Appearance of the Other Party, and Such Awards are Given the Same Effect as Other Awards of the Board.**

The second question put by this Court presents two possibilities: either (1) the Adjustment Board is without

*However, it is not believed that such a contention would be sound (see discussion at pp. 188-91 below).

authority to make an award *ex parte* where only one of the parties to the dispute appears before it, and any such award issued by it is without the force or effect which the statute gives to an award; or (2) the Board has such authority and may, upon submission of the dispute to it by one of the parties without the appearance of the other party, issue an award which has full force and effect, to the same extent as an award issued by it where both parties have appeared. Examination of the language of the Railway Labor Act and of the actual practices of the Board thereunder shows that it is the second of these two possibilities which is in accordance with the facts and the law and which the carriers must accept, at least in the absence of an authoritative judicial pronouncement to the contrary.

1. The Language of the Railway Labor Act Supports the View That the Adjustment Board has Authority to Determine and Issue Awards in Disputes Submitted to it by One Party Without the Appearance of the Other Party.

Let the first of the two possibilities presented by the Court's second question be considered. The only portion of the Railway Labor Act which bears in any way on the question whether or not the Adjustment Board may make an award on the submission of one party alone is contained in Section 3 First (i) of the Act. It will be recalled that that section provides that disputes "may be referred by petition of the parties *or by either party* to the appropriate division of the Adjustment Board." Thus, the Act specifically says that a dispute may be referred to the Board by petition of either party. What sense or significance would this language have, if the Board were without authority to consider and decide a dispute so submitted by one party and if an award made by it with respect to such a dispute were without force or effect? If such a conclusion were reached, then the provision that a dispute could be submitted by *either* party would have

no significance because a dispute so submitted would be one which the Board could do nothing about.

On the contrary, if any meaning and import is to be given to the language providing for submission of a dispute by either party, then it must be construed as authorizing the Adjustment Board to take cognizance of a dispute so submitted by one of the parties and to proceed, as a court would, to consider the merits and render an award, whether or not the other party appears after having been given due notice and opportunity to do so. In an ordinary legal proceeding a plaintiff may submit a controversy to a court and the court, assuming that it has jurisdiction of the subject matter and of the person of the defendant, will, upon proof of proper service on the defendant and opportunity given him to appear, proceed to consider and determine the controversy, even though the defendant may not in fact appear. In the same way, the sense of the provisions of Section 3 First (i) of the Railway Labor Act seems clearly to be that the Adjustment Board may proceed in like manner and may consider and determine a dispute submitted to it by one of the parties alone, even though the other party, although notified* and given an opportunity to appear in accordance with the Board's rules, fails to do so. Of course it is the carriers' view that the Board's rules do not give them adequate notice and opportunity to appear and defend themselves against claims submitted to the Board by employes. However, this is a question of the adequacy of the Board's rules which has not yet been passed upon with any finality by the courts, and so long as those rules stand the carriers are obviously obliged as a practical matter to abide by them or incur the risk of having awards entered against them for lack of a defense.

---

*Where a party affected by an award of the Adjustment Board has been given no notice of the Board's proceedings, it has been held that the Board's award is invalid as to him: *Nord* v. *Griffin*, 86 F. (2d) 481 (C. C. A 7th, 1936), cert. den. 300 U. S. 673, 57 S. Ct. 612.

Thus it is clear, from the language of the Act permitting the submission of a dispute to the Adjustment Board "by either party," that the Act contemplates that the Adjustment Board should take cognizance of a dispute so submitted by one of the parties and render an award with respect thereto, even though the other party should fail to appear.

For the same reasons, it is clear that such an award rendered by the Board with respect to a dispute submitted to it *ex parte,* without the appearance of the other party, is given by the statute the same force and effect as an award rendered after the appearance of both parties. As pointed out above, the language of Sec. 3 First (i) of the Act to the effect that disputes may be referred to the Board by petition of either party would have no sense or significance if it were held that the Board is without authority to consider and determine such disputes. That language of the Act would be equally without sense or significance if it were held that, although the Board could take cognizance of a dispute so submitted by either party and could enter an award with respect thereto, such award would be without force or effect. No distinction is made by the Railway Labor Act, or even suggested by any of its provisions, between the effect of a default award rendered by the Board against a carrier, for example, in the absence of its appearance, and an award entered against a carrier where both parties have appeared. Nothing in the statute suggests, and there is no reason to look for, any middle ground between the proposition, on the one hand, that an award issued by the Board with respect to a dispute submitted by one party without the appearance of the other is without force or effect, and, on the other hand, the proposition that such an award has the same force and effect as an award entered after the appearance of both parties. Since the first of these two propositions is plainly contrary to the language of the Act in that it would render such language

without meaning or significance, it follows that the second proposition must be accepted, and it must therefore be concluded that an award entered by the Board upon the submission of the dispute by one party without the appearance of the other is given by the statute the same force and effect as an award entered after the appearance of both parties.

2. The Practice of the Adjustment Board is to Take Cognizance of a Dispute Submitted to it by One Party Without the Appearance of the Other Party and to Enter a Default Award Against the Non-Appearing Party in Such a Case.

As a matter of fact, the Board has consistently followed the practice of entering default awards, with apparent disregard of the merits, against carriers who fail to appear to defend themselves against a unilateral submission of a dispute by an employe or employes. This is demonstrated by the Board's own published reports of its awards. Examination of those reports shows that, in cases where there is a submission by both parties, the report contains a section entitled "Employees' Statement of Facts," followed in turn by a statement of the carrier's "position." Where, however, the carrier does not appear before the Board, the Board's report contains only the "Employees' Statement of Facts" and the statement of the employes' "position," and does not contain any section entitled "Carrier's Statement of Facts" or statement of the carrier's "position," and the section of the Board's report entitled "Findings" contains a statement to the effect that the carrier, although notified, made no answer to the *ex parte* submission and was not represented at the hearing. See, for example, the awards reported at pages 318-70, inclusive, of Vol. XII, "Awards 2066 to 2200, First Division, National Railroad Adjustment Board" (Government Printing Office). In the case of each of those reports, the section entitled "Findings" contains the following language:

"*Findings.*—The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that: * * *

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The respondent carrier herein has not made answer to petitioner's ex parte submission in accordance with the rules of procedure adopted by the Division, or within a period of time, with extensions granted, which period of time the Division finds to have been reasonable, and was not represented at the hearing and did not introduce any evidence.

"This award is, therefore, necessarily based upon the facts and evidence submitted by petitioner and the agreement governing wages and working conditions found to exist between the parties."

It will be further noted from these reports that the Board enters exactly the same sort of award, in favor of the employes, in cases in which the carriers do not appear as it does in cases in which the carriers do appear. Thus the well established practice of the Adjustment Board is to enter default awards against carriers who fail to appear in response to *ex parte* submissions by the employes.

The result of this practice on the part of the Board has of course been to compel carriers to appear before the Board in response to a unilateral submission of a dispute by an employe or employes, even in cases where the carrier does not believe it proper for the Board to entertain jurisdiction of the dispute, and despite the carrier's view that the Board's rules of procedure do not give it adequate notice and opportunity to be heard. Unless a proceeding like the present one is permitted to go forward on the merits, there has been and will be no way for a

carrier to obtain a judicial determination of the question whether or not the Board has authority over the dispute when a carrier fails to appear before it, or of the question whether or not the Board's rules provide adequate notice and opportunity to be heard, or of any other question concerning the validity and propriety of any of the Board's awards. The reason for this inability to obtain a judicial determination of such questions is that the Railway Labor Act makes no express provision of a method for the carrier to proceed on its own initiative to obtain such a judicial determination after an award has been made, and the employes in fact never exercise the opportunity given them by Section 3 First (p) of the Act to bring these disputes into court after they have obtained favorable awards from the Adjustment Board, since they are ordinarily able to obtain compliance by other, and to them more effective, methods (see pages 103-23 below). Therefore, unless a judicial determination of the merits of the Board's awards and of the adequacy of its procedure is permitted in such a proceeding as the present one, the carriers will continue to be without an opportunity of having a judicial determination of legal questions affecting their rights and obligations.

3. In View of the Provisions of the Railway Labor Act and the Board's Practice of Entering Default Awards Against Non-appearing Carriers, the Carriers are as a Practical Matter Compelled to Treat those Awards as Having the Same Effect as other Awards, and They Accordingly Find it Necessary to Appear Before the Board and Defend Their Rights Against Unilateral Submissions of Disputes by Employes, with the Result that the Carriers Cannot be Said to be Exercising a Voluntary Choice or Election in Appearing Before the Board.

Since the practice of the Board thus is to enter a default award against a carrier who fails to appear and defend

itself against a unilateral submission of the dispute, and since the carriers have up to the present time been denied any opportunity to obtain judicial consideration and determination of their rights and obligations in matters thus unilaterally submitted to the Board by the employes, it is plain that, when an employe or group of employes chooses to submit a dispute unilaterally to the Board, a carrier has no practical alternative except to appear before the Board and defend itself as best it can against the claim. There are two principal reasons why any other course would be impractical and in fact impossible for a carrier in such a position. In the first place, it would be unwise and wholly neglectful of the carrier's rights for it to refuse to make the best defense that it can before the Board, when it knows that, without such defense, the Board will automatically proceed to enter a default award against it, whereas the presentation of such a defense may—although in most cases it does not—have some persuasive effect on the Board. For a carrier thus to refuse to appear and defend itself on the merits before the Board would be as unwise and as neglectful of the carrier's rights as it would be for a defendant in a Federal court proceeding to refuse to present its case on the merits to the court after a denial of its motion to dismiss for want of diversity of citizenship or other like jurisdictional basis.

In the second place, it would as a practical matter be impossible for the carriers to ignore the Board by refusing to appear before it, because such a refusal would in the public eye amount to ignoring the machinery set up by an important enactment of Congress and disregarding the public policy which that enactment purports to represent. As a practical matter, the carriers could not properly and successfully adopt a policy of ignoring the Adjustment Board and its awards, in cases which are unilaterally submitted to the Board by employes without the concurrence of the carriers. The existence of the adjustment

procedure, its establishment by Congress, its embodiment as an important provision in the Railway Labor Act, and the expectation founded upon it by the carriers' employes, all preclude the possibility of such a course on the part of the carriers, at least in the absence of some authoritative judicial pronouncement to the effect that carriers are not bound to appear in the case of such *ex parte* submissions and that awards made by the Board in default of such appearance are without force or effect.

Of course if this Court should decide that the Adjustment Board is without authority to determine a dispute submitted to it by one party without the appearance of the other party, the dangers to which the carriers would be exposed by refusing to appear in such cases and the reasons of policy against such refusal to appear would no longer be controlling. But, in the absence of such a decision, carriers have no alternative except to appear and defend themselves against such *ex parte* submissions.

Nor do the carriers have any practical alternative except to treat awards entered against them on *ex parte* submissions as having the same force and effect as awards entered against them after the appearance of both parties. As pointed out above, no distinction is made by the Railway Labor Act between the effect of a default award entered on an *ex parte* submission and the effect of an award entered after the appearance of both parties, and certainly no such distinction is made or suggested by the Board's decisions or rules. As a practical matter, awards entered on *ex parte* submissions are treated by the Board and by the employes as having the same force and effect as awards entered after the appearance of both parties, and the carriers could not safely treat such awards on *ex parte* submissions in any other way. Whether an award of the Board against a carrier is made in default of the carrier's appearance or is made after its appearance and presentation of a defense on the merits, the award has the same compelling effect on the carrier, re-

sulting from the economic pressure of the circumstances of the award and from the economic pressure brought to bear by the employes to enforce it (See pages 113-23 below), and in the face of such a prospect a carrier could not, without laying itself open to the charge of neglecting its interests and the interests of its owners, and of defying Congressional policy, sit idly by and refuse to defend itself before the Board.

It follows from what has been said above that the answer to the second question put by the Court in its order of November 16, 1942, must be that the Adjustment Board may under the Act, and in fact does, make an award *ex parte* if one party to the dispute does not appear before the Board, and that such awards are given by the language of the statute and are regarded by the Board and the employes, and cannot safely be otherwise regarded by the carriers, as having the same force and effect as awards of the Board made after appearance by both parties. Until there is an authoritative judicial pronouncement to the contrary, a carrier has no practical alternative, in the case of a unilateral submission of a dispute by the employes, except to appear before the Board and defend itself as best it can.

## SECTION III.

### (Answer to the Second Part of the Court's First Question.)

### NEITHER PARTY TO A DISPUTE OVER WHICH THE ADJUSTMENT BOARD HAS AUTHORITY IS PRECLUDED FROM SEEKING A DETERMINATION OF THE DISPUTE IN THE COURTS AFTER SUBMISSION OF THE DISPUTE TO THE BOARD.

#### A. Introduction and Summary of Argument.

The preceding sections of this brief have dealt with questions preliminary to the issue now before this Court for decision in the case at bar. That issue, which is raised by the second part of the first question put by this Court in its order for reargument, is as follows:

> "Whether either party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts • • • *after* submission of the dispute to the Board."

Petitioner's contention is that, in the absence of express statutory provisions to the contrary, this question must be answered in the negative, for reasons to be developed in the present section of this brief. By way of introduction to the more detailed discussion, those reasons will first be broadly summarized in terms which will relate them to the points already established in earlier sections of this brief.

From what has already been established in preceding sections, it follows that the adjustment procedure of the Railway Labor Act is not an exclusive or compulsory procedure, and furthermore is not a method of adjudicating the parties' legal rights under their contracts but is merely a system of "peaceful adjustment and mediation." It also follows that, in view of the way in

which the adjustment procedure is set up and operates, the issue of an award by the Adjustment Board can be brought about by the purely unilateral action of one party to the contract. This being so, if it should now be held that when the adjustment procedure has been invoked, or after it has been invoked and pursued to a conclusion in an award, the employer is thereafter barred from recourse to the courts, this would mean that the employe by unilateral action has it in his power to deprive the employer of opportunity for judicial relief, and can thus make the adjustment procedure exclusive as against the employer, although that procedure is admittedly not designed or adapted to result in a determination of the employer's legal rights. In other words, one party to the contract would have the power to preclude the other from a judicial determination of its rights by creating a situation where the other party would be limited to an "adjustment" of its rights by a non-judicial body. Petitioner submits that the Railway Labor Act should not be construed to produce such a result where there is nothing in the language of the statute to require it and where, on the contrary, the legislative history of the statute plainly requires an opposite result.

Petitioner's argument as thus summarized follows from an acceptance of this Court's decision in the *Moore* case as correct. *A fortiori,* the same result would follow even more certainly if, for purposes of argument, the view should be taken that the *Moore* case was not rightly decided. For, if the *Moore* case was not rightly decided, neither party would be entitled to resort to the courts or would be able to obtain a judicial determination of its rights until after the adjustment procedure had been invoked and had resulted in an award of the Adjustment Board. If this view should be adopted, then clearly after such an award had been made either party must be held entitled to resort to the courts, since otherwise the party denied such access would be precluded altogether from a

judicial determination of its legal rights and would be placed wholly at the mercy of a body whose decisions do not profess to determine rights and whose nature and procedure are frankly not adapted to that purpose. Such a result ought not to be read into the Railway Labor Act or any other statute by construction unless clearly required by the language, or if not by the language, then by the legislative history of the Act.

The principal arguments in favor of the conclusion that after an award of the Adjustment Board the employer should be denied recourse to the courts may be described as two-fold. There is, first, what may be called the technical argument, and, second, the argument from policy. Each of these will now be summarized.

The technical argument, which is fully developed in the opinion of the majority of the Court of Appeals below, and which appears to have afforded the chief reliance of that Court in reaching its decision, is to the following effect. The adjustment procedure established by the Railway Labor Act must be regarded as consisting, after the preliminary negotiations between the parties, of two subsequent stages.* The first stage is said to be the proceeding before the Adjustment Board itself, leading up to an award by one of the Divisions of that body; the second stage is said to consist of the statutory suit at law under Section 3 First (p) of the Act, which is open only to, and may be brought only by, an employe or employes who have obtained a favorable award from the Board. Since the suit under Section 3 First (p) is thus the second stage of what is essentially a single procedure, of which the proceeding before the Adjustment Board is the first

---

*In this connection, the statutory process was described as follows in the majority opinion below (p. 242 of 124 F. (2d); R. 336):

"The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement. While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision."

stage, the consequence is said to follow that, after the adjustment procedure has been initially invoked in a proceeding before the Board, no other form of judicial proceeding is thereafter permissible except a suit by the employe under Section 3 First (p). It is said that the entire procedure in both its stages is a unit and must be followed through, so that when an employe has taken a controversy to the Adjustment Board the employer is thereafter completely deprived of a judicial determination of its rights unless the employe subsequently chooses to avail himself of his right to bring a statutory suit under Section 3 First (p). This argument is based on the contention that in the statutory suit under Section 3 First (p) the employe bringing such a suit is given certain advantages; that he would be deprived of these advantages if a suit could be brought by the employer; and that Congress must therefore be taken to have intended that no other kind of suit, except a suit under 3 First (p), should be brought. The proposition having thus supposedly been established that, after the services of the Adjustment Board have been invoked, judicial redress becomes limited to the procedure through Section 3 First (p) and that procedure becomes exclusive, it is then said that the employer, in so far as it can be treated as a party to the Adjustment Board procedure, must, after participating in the Board's proceedings, be regarded as having thereby waived its rights to any judicial determination other than that available to it at the employe's option through Section 3 First (p).

The argument thus summarized will be answered in detail below; but it seems desirable to point out at once that in the last analysis it rests on the single ground that, unless the judicial remedy through Section 3 First (p) is treated as exclusive, the employe would be deprived of the advantages under that form of remedy which Congress is supposed to have intended him to have. If it is shown, as in fact it will be, that the employe will not be deprived

of those advantages, or of any advantages, by the availability of another judicial remedy to the employer, then the argument in favor of the exclusiveness of the remedy through Section 3 First (p) falls to the ground, and with it falls the whole technical argument against the petitioner's right to maintain this suit. At the same time, if the basis is thus removed from the contention that after the adjustment procedure is invoked the judicial remedy through Section 3 First (p) becomes necessarily exclusive, there is no ground for contending that an employer through becoming a party to the adjustment procedure elects to accept the Section 3 First (p) procedure as its sole judicial remedy.

In addition to what has been called above the "technical" argument against petitioner's right to maintain this suit, there is the broader argument purporting to be based on "policy." This is to the effect that, if, after the adjustment procedure has been set in motion, any other form of judicial remedy were available to the employer than that which may be brought at the option of the employe under Section 3 First (p), the Railway Labor Act would be rendered unworkable and the purposes which Congress allegedly had in mind in enacting that Act would be defeated.

Both the technical argument and the argument from policy, as above outlined, are alike in one respect. Both are based on the contention that, after the procedure before the Adjustment Board has been invoked, the employer's right to judicial relief becomes limited to a statutory suit brought by the employe and solely at the employe's option under Section 3 First (p) of the Act. If this contention is capable of acceptance, it must be on the supposition that the availability of such a remedy adequately protects the employer's rights and that the exclusive character of that remedy does not work undue

hardship and oppression on the employer. Otherwise, on ordinary principles of statutory interpretation, the Railway Labor Act should not be given a construction which would produce such a result.

As a matter of fact, it is easy to show, and will at once be shown in the next sub-division of this brief, that a construction of the statute which would remit the employer to a suit under Section 3 First (p) brought by the employe, as the employer's sole and exclusive opportunity for judicial relief after the employe has invoked the adjustment procedure, would not afford the employer a reasonably satisfactory or adequate opportunity for judicial determination of its rights, would not adequately protect those rights, and would work undue hardship and oppression on the employer by barring it from judicial relief altogether and effectively cornering it in a position where it becomes a helpless victim of pressure and coercion.

After this has been shown, the so-called argument from policy will be discussed and it will be established that a construction which would torture the Railway Labor Act into producing the result just described is not required by any policy that can be implied from the language of the Act or that can be supposed on the basis of any evidence whatever to have been within the purpose or intent of Congress.

Finally, the so-called technical argument, outlined above, will be discussed and the question will be considered whether the oppressive and arbitrary result above described is required in order that employes may not be deprived of the special advantages to which they are entitled if they choose to bring suit under Section 3 First (p). It will be readily demonstrated that they will not be deprived of those advantages if such a suit as the present one may be maintained.

Thus, petitioner's position in answer to the second part of the court's first question may be summarized as follows: First, to hold, as did the majority of the Court of Appeals and as respondents urge, that, after a controversy has been submitted to the Adjustment Board by the employes, the employer is not entitled to a judicial determination of its rights otherwise than in a statutory proceeding brought by the employes under Section 3 First (p) of the Act, would have the result of making it possible for the employes by unilateral action to obtain a favorable award from the Adjustment Board and then, by refraining from bringing suit under Section 3 First (p), to deprive the employer altogether of an opportunity for a judicial determination of its rights under its contract with the employes, while at the same time the employes exert pressure and coercion on the employer in order to compel its compliance with their wishes, as expressed in the award of the Board, regardless of the employer's rights under its contract with the employes. Second, the Railway Labor Act should not be construed so as to produce the arbitrary and oppressive results which would thus follow from denying the employer access to the courts on its own initiative after an award of the Board, because such a construction is not required or supported either by any supposed policy of the Act or by any of the provisions of the Act, including the provisions of Section 3 First (p) which give to the employes certain advantages in suits brought thereunder. Finally, the fact that petitioner appeared and defended itself before the Adjustment Board did not amount to a voluntary choice or election by it of the adjustment procedure so as to bar it thereafter from asserting its right to judicial relief subsequently to the issuance of the Board's award.

**B. To Hold that, After a Controversy Has Been Submitted to the Adjustment Board by the Employes, the Employer is not Entitled to a Judicial Determination of Its Rights Under Its Contract With the Employes Otherwise Than in a Statutory Proceeding Brought by the Employes Under Section 3 First (p) of the Act, Would Have the Result of Depriving the Employer Altogether of an Opportunity for a Judicial Determination of Those Rights, and Would Thus Make It Possible for the Employes by Their Unilateral Action to Exclude the Employer from Access to the Courts and At the Same Time Exercise Pressure and Coercion on the Employer to Compel Its Compliance With an Award of the Board in Their Favor, Irrespective of The Employer's Legal Rights.**

The decision of the majority below, which construes the Railway Labor Act so as to exclude the employer from access to the courts on its own initiative after submission of the dispute to the Adjustment Board, has the effect of placing the employer in a position where it is cornered and deprived of its only possible means of relief, so that it becomes the helpless victim of pressure and coercion exerted upon it by the employes in order to obtain fulfillment of their wishes, as expressed in the Board's award, irrespective of whether the employer's rights are infringed thereby. This follows from the fact that, under the decision of the majority below, the employes may by unilateral action compel the submission of their dispute with the employer to the Adjustment Board, and may thereafter, by refraining from bringing suit under Section 3 First (p)—which may be brought only at their option—render entirely illusory the theoretical opportunity which that section appears to afford of obtaining a judicial determination of the employer's rights. Having thus secured, entirely by unilateral action and without the employer's consent, a favorable award from the Ad-

justment Board and having at the same time deprived the employer of any opportunity for a judicial determination of the issues involved in the award and the employer's rights with respect thereto, the employes are then free to invoke the authoritative status and quality of the award and the economic pressure which its mere existence exerts, to reinforce the exercise of their own collective economic power for the purpose of obtaining compliance with their wishes as expressed in the award.

In developing this argument in this section of the brief, it will be necessary to dispose of three contentions made by respondents and the majority below in reply to petitioner. These are, first, that Section 3 First (p) provides an adequate opportunity for the employer to obtain a judicial determination of its rights and that the employer has nothing to fear if a proceeding under that section is not brought, since an award of the Board is not legally self-enforcing or enforceable as such; second, that the statutory remedy provided in Section 3 First (p) should be held to be adequate because of the similarity of its language to the language of the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act, which, according to respondents, have been held to be an adequate and exclusive remedy for the situations to which they apply; and third, that the employer should not be heard to complain of the denial to it of access to the courts on its own initiative after submission of the dispute to the Adjustment Board, because under the doctrine of the *Moore* case the employer has adequate opportunity to obtain on its own initiative a judicial determination of its rights prior to the submission of a dispute to the Board.

These contentions will be answered in conjunction with the development of petitioner's argument in full, in the following subdivisions of the brief.

1. The Provisions of Section 3 First (p) of the Act Do not Afford the Employer a Reasonable or Adequate Opportunity for a Judicial Determination of its Rights.

The contention that after an award of the Adjustment Board the employer's right to a judicial determination of the controversy is limited to a proceeding brought by the employe under Section 3 First (p) of the Act, and that such a proceeding affords the employer a sufficiently adequate opportunity for access to the courts, at least presupposes that suits will actually be brought by employes under Section 3 First (p). If in fact no such suits are brought, if Section 3 First (p) is never used by the employes, then to tell the employer that its exclusive opportunity for judicial relief is through such a proceeding and that that opportunity is adequate, is a futile, formal and fundamentally disingenuous argument. It is one of those arguments

> "That palter with us in a double sense,
> That keep the word of promise to our ear
> And break it to our hope."

To tell one of the parties to a contract that his only opportunity for a judicial determination of his contract rights must be through a proceeding which can be brought only by his adversary but which in fact that adversary will never bring is to trifle with him. Yet such is in fact the substance of the argument to the effect that the employer must await a proceeding under Section 3 First (p) for its day in court, because it is well established that such proceedings are never brought and never will be brought, and that it is against the settled policy of the labor unions to bring them. For these reasons it is clear that the statutory procedure under Section 3 First (p) does not afford the employer an adequate judicial remedy or any judicial remedy; and this will be shown in the ensuing subdivisions of this brief, after which it will

be demonstrated that there is no merit whatever in respondents' contention that Section 3 First (p) must be construed as excluding other forms of judicial relief for the employer because of similarity in the language of that section to sections of the Interstate Commerce Act and the Packers and Stockyards Act, providing for statutory reparation suits.

(a) *The Possibility of Judicial Relief for the Employer Through a Suit under Section 3 First (p) is not Merely Uncertain for the Reason That Whether or not to Institute Such a Suit Rests Entirely in the Option of the Employes, But is in Fact Completely Illusory and Fictitious Because it is Well Established That as a Result of the Settled Policy of the Labor Unions Suits Under Section 3 First (p) are Never Brought.*

The defectiveness in the opportunity for judicial relief which Section 3 First (p) is supposed to offer to the employer consists not in the fact that the employes have it in their power to determine whether or not suits under that section shall be brought, but in the fact that in reality and experience such suits are never brought, and it is the well-settled and well-understood policy of the labor unions that they are not to be brought. This has been pointed out by Dean Garrison, in an article entitled "The National Railroad Adjustment Board: A Unique Administrative Agency," 46 Yale L. J. 567, in the following language (pp. 591-2 of 46 Yale L. J.; pp. 129-30 of Appendix to Compilation):

> "The Board [*i. e.*, the National Railroad Adjustment Board] has no powers of enforcement, and therefore non-compliance by a carrier may continue with impunity unless the union acts to obtain compliance. This the union can do in two ways: first, by petitioning the appropriate United States District Court for an order enforcing the Board's award

> [*i. e.*, by a proceeding under Section 3 First (p)] pursuant to the procedure laid down by the statute; and secondly, by economic pressure. The first course has not been adopted. Out of 1,616 awards handed down by the four Divisions up to July 30, 1936, of which considerably over half must have been in favor of the employees, *not one was taken to court for an enforcement order, and the presumption is either that the carriers willingly complied in all these cases, or that, in some of the cases where the carriers did not at first comply, compliance was brought about by threatened strikes.*
>
> "The net result is that, with one exception, *no judicial review of the Board's capacity, procedure or decisions has been had, and none is likely to be had.*" (Emphasis supplied.)

On the same point a representative of the Attorney General's Committee on Administrative Procedure has reported as follows (Compilation, p. 89):

> "Theoretically, the railroads do not need to comply with an award until an action is brought in court to enforce the award. The theory does not accord with the fact, however, because *in practice the unions are usually sufficiently strong that they can use their economic power to enforce the awards without going to court.* This can be done by permitting a number of unenforced awards to accumulate and then taking or threatening to take a strike vote to compel the carriers to comply with the awards. *Of about 5,000 awards that the Board has made to date, not more than half a dozen enforcement proceedings in court have been brought, and yet the great preponderance of the awards have been complied with.*" (Emphasis supplied.)

Another observer, who has served as a referee for the First Division of the Adjustment Board, comments as follows (William H. Spencer, "The National Railroad Adjustment Board," University of Chicago Press, Chicago, 1938, pp. 55-57; reprinted in Appendix to Compilation, p. 148 ff., and especially pp. 205-7):

> "In spite of the fact that the Railway Labor Act has made it as easy and as economical as possible for an employe or his representative to sue in the federal courts upon awards rendered by the Board—by relieving him of his normal liability for costs, by providing for an attorney's fee, and by making the award *prima facie* evidence of the validity of the claim—*labor organizations have discouraged claimants from utilizing the statutory method of enforcing awards.* They are convinced that in the long run they cannot compete with the superior legal talents and tactics of carriers in formal litigation. *The labor organizations accordingly rely upon their collective strength to secure compliance with the awards granted in their favor.* • • • It was the assumption underlying the amended Act that petitioners would sue on their awards, thus affording the carriers an opportunity to secure judicial review of awards. *Certainly, the sponsors of the legislation did not contemplate that strike votes, the mediation machinery, and emergency boards should be relied upon so strongly as means of securing compliance with awards.* Because of the pressure thus placed upon them, carriers contend that they are for all practical purposes denied the privilege of contesting awards in judicial proceedings." (Emphasis supplied.)

Respondents themselves have admitted that the employes do not rely on Section 3 First (p) proceedings in order to obtain compliance with awards of the Board. Thus, respondents said in their brief in the District Court (R. 103):

"The orders of the Board find their primary sanction in the collective economic bargaining power of the employees."

It is thus well recognized that to all intents and purposes the procedure under Section 3 First (p) is a dead letter, is never set in motion by the only parties who can set it in motion, and is, therefore, purely illusory. Accordingly, any opportunity which that procedure may be alleged to offer to the employer for a judicial determination of its rights is likewise illusory.

(b) *Since Judicial Relief Through a Suit under Section 3 First (p) is Purely Illusory, the Employer, if Denied Access to the Courts Through Any Other Form of Proceeding, is Left in a Position Where the Sole Determination of its Controversy with the Employes Respecting Their Contract Rights is Embodied in an Adjustment Board Award, which is not Merely Arrived at Through Wholly Non-judicial Methods, but Which Furthermore Does not Purport to Adjudicate the Rights of the Parties But Applies Instead What the Board or Its Referees Choose to Regard as a Satisfactory "Adjustment" of the Controversy.*

If the view be accepted that after submission of a dispute to the Adjustment Board the employer has no opportunity for judicial construction of the contract provisions out of which the dispute arose unless the employes bring suit under Section 3 First (p), this means, as pointed out in the preceding paragraphs, that the employer has no such opportunity at all. If this should be held to be the law, the employer would be left in a position where the sole pronouncement purporting to determine the controversy would be the Adjustment Board award, which, as will be pointed out below, necessarily carries with it a certain quality of authoritativeness. Accordingly, it is important to recognize in the present

connection that not merely is an Adjustment Board award arrived at through the wholly non-judicial methods previously described, but that it does not purport to adjudicate the legal rights of the parties and may not even represent an attempt to interpret the contract between them according to their intent. On the contrary, it represents an effort to solve the controversy by arriving at what the Board or its referees choose to consider a satisfactory "adjustment" of the conflicting contentions.

The functions of the Adjustment Board were described as follows by respondents in the courts below (Defendants' Memorandum Brief, p. 21; R. 87):

> *"A judge decides the case before him, while, as its name implies, this Board is intended to adjust matters submitted to it.* 'Compromise' judgments of courts are contrary to the whole theory of the law, while a reasonable and acceptable compromise embodied in an order of the Board will often fulfill the exact purpose for which it was created." (Emphasis supplied.)

And again (Defendants' Memorandum Brief, pp. 66-67; R. 132-33):

> "* * * *the jurisdiction of the Board is to handle the dispute, not to make an interpretation of the agreement.* The full significance of this distinction will be more apparent, we believe, when we consider the nature of the decision which the Board is empowered to make in relation to a dispute before it.
>
> *"The function of a court is to render a judgment between parties who are before it as litigants.* Such a judgment has the effect of establishing the parties' present rights. With their future relations the Court has no concern, save to supervise the enforcement of its decree if necessary. It is a matter of common knowledge that while the adversary character of the

proceedings of the courts, and the uncompromising nature of their decrees are well adapted to the decision of cases, they are not conducive to the establishment of cordial relationships between the parties in the future.

"*In this regard the National Railroad Adjustment Board performs a function entirely different from that of the courts.* The parties before it, carrier and employees, are parties to a continuing relationship. The *future* of that relationship is a matter of prime concern to the Board. The handling of a present dispute may involve incidentally a consideration of present legal rights, but *the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them* in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption." (Emphasis supplied.)

Substantially the same view was expressed to the Attorney General's Committee in a written statement by labor members of the Adjustment Board in the following language (Compilation, p. 212):

"It is our very definite conclusion based upon the history of the law that *the Adjustment Board never was intended to function as a court of equity, but rather that it should operate as a continuation of the conference room method* employed upon the various properties where men and management 'talk things through', argue the meaning of rules, discuss the application in effect under those rules, and finally attempt to reach an equitable 'adjustment' based upon our practical knowledge of how things are done 'back home'." (Emphasis supplied.)

There has apparently been some difference of opinion among members of the Adjustment Board as to precisely

what their function is (see Compilation, pp. 123-218, 230-31), but it is plain from the decisions of the Board that the difference is principally as to how the "adjustments" are to be arrived at, and whether this is to be through "horse-trading" between Board members or through the imposition by the Board of rigid rules of decision, legalistic in character, which grow out of abstract principles of supposed policy but do not find their origin or basis in the contracts of the parties. Thus the following statement is made in a report to the Attorney General's Committee on Administrative Procedure (Compilation, pp. 230-31):

> "Whether the work of the Board should be denominated 'adjustment,' as the Board's name implies, or whether it is adjudication, is a matter of interpretation on which opinions differ widely. • • • The carrier and labor members differ in their analysis of the work of the divisions. For example, the chief of personnel of a large railway, an officer who has had much experience in the Adjustment Board's affairs, declares: 'In hearing and deciding the cases which come before the Board [the Board members] do not act as negotiators or adjusters. Whatever may have been the intent of the law in setting up an Adjustment Board there has been no trace in the history of the Board of any view on its part that its function is to iron out differences by taking into account the situation and needs of the parties and the practical effect of their respective demands, and on the basis of such consideration making concessions to one party in return for concessions made by it for the good of the industry as a whole. The Board has never taken this view of its functions. Instead it has assumed with the strictest legalistic viewpoint that the loosely drawn and often vague terms of the schedules and agreements which come before it have a rigid technical meaning, and that this meaning is to be discovered

> by a process of purely technical reasoning. The most cursory examination of the nature of the arguments put up to the Board and the grounds of its decisions where these are given, conclusively demonstrates that it regards its function as one of strict legal interpretation rather than compromise and adjustment'."

The only criticism to be made of the language just quoted is with respect to the statement in the last sentence that the Board regards its functions as one of "strict legal interpretation." This is incorrect if it means that the Board interprets and applies the contracts between the parties in accordance with law. A more accurate statement is that contained in the immediately preceding sentence, where it is said that the Board applies its own "rigid technical meaning" to the terms of agreements. This is illustrated, for example, by the award of the Board involved in the case at bar. The Board arrived at that award by the application of two highly abstract and theoretical concepts of its own manufacture—first, the concept of a seniority as carrying with it by presumed implication a monopoly of a department of work, and, second, the artificial distinction between so-called road work and so-called yard work, whereby neither can be performed by employes who perform the other. Thus the award in the case at bar was arrived at neither by the judicial process of attempting to construe the contract according to the intent of the parties, nor by the process of adjustment in the sense of mutual concessions designed to promote the practical effectiveness of the operation. On the contrary, it was arrived at by the imposition of theoretical and artificial rules which were doubtless believed by the labor members of the Division and by the referee to constitute desirable policy from their particular viewpoint.

In any event, it is clear that the labor members of the Board and the referees approach their task of decision from the standpoint expressed in the respondents' state-

ment quoted above, that "the Board's function is not to adjudicate as to the rights, but to adjust the dispute regarding them in such manner that the parties may in the future be enabled to conduct the business of interstate commerce without friction, and without interruption" (Defendant's Memorandum Brief, p. 67; R. 133). The last words of the quotation appear to mean very definitely that the purpose of decisions of the Board should be primarily to satisfy the employes so that they will not interrupt interstate commerce by a possible strike, as might happen if they were not satisfied.

To accomplish this purpose the labor members of the Board, with the concurrence of referees, have succeeded in embodying in many awards abstract principles of the kind above referred to. Awards founded on these principles are then erected into "precedents" which subsequent referees are induced to apply to later cases, regardless of the actual contracts involved in those cases. Against this practice the carrier members of the Board protested to the Attorney General's Committee on Administrative Procedure in the following language (Compilation, p. 221):

> "It is the duty of this Board to hear and decide disputes, properly referred to it, in strict conformity with the agreements between the particular carrier and employees involved, applicable to the issues in question, giving due consideration to the practices and precedents established on that property in the administration of the applicable rule or rules of the agreement under which the dispute originated. *The Act surely did not contemplate that the Board take into consideration in reaching its decision precedents established or rules in effect on properties other than those involved in the dispute.*" (Emphasis supplied.)

The "Statement and Recommendations of Class I Railroads" to the same Committee contains a comprehensive

summary of the "principles," many of them highly abstract and artificial in character, which the Board has developed as the basis for its awards (Compilation, pp. 278-287). Characterizing these principles, the Class I carriers said in their presentation (Compilation, p. 279):

> "The tendency of the Board's decisions is to pluck out of the air so-called general principles, lying outside of the contract of the parties, and by verbal logic carry those principles forward to extreme results regardless of the intention of the parties."

It seems clear from a comprehensive study of the Board's decisions that the labor members of the Board and many of the referees, in the supposed interest of aiding the parties to "conduct the business of interstate commerce without friction and without interruption," conceive it as their duty, under the guise of interpretation, to write a set of uniform nation-wide rules for the railroad industry embodying a particular economic philosophy, irrespective of the actual contract which the employes on different properties may have entered into with their employers. This is apparently what the labor members of the Board had in mind in their statement to the Attorney General's Committee, already quoted (p. 108 above), where they said that the Adjustment Board was never intended to function as a court but that its function was to attempt to reach what they called an "equitable adjustment" (Compilation, p. 212).

If, after an award has been made by the Adjustment Board on the foregoing principles in disregard of the contract rights of the parties, the employer is precluded from any recourse to the courts for a judicial determination of those rights, the employer is obviously left in a position where there is outstanding against it, as what appears to be the sole authoritative declaration of its duties and obligations, an award of the Board which may have been arrived at without giving effect to the provisions of the contract at all.

2. The Existence of an Award of the Board Favorable To the Employes, Coupled With the Denial to the Employer of Any Opportunity for a Judicial Determination of the Issues Involved in the Award and the Rights of the Parties With Respect To Those Issues, Successfully Subjects the Employer to the Exercise of Pressure and Coercion by the Employes to Compel Its Compliance With the Award, Regardless of the Employer's Legal Rights.

(a) *Although an Award of the Adjustment Board is not Enforceable by Legal Procedure if a Suit Under Section 3 First (p) is not Brought to Enforce It, It Constitutes a Determination Made Under Statutory Authority, and as Such, if not Subsequently Shown by Judicial Proceedings to be at Variance With the Contract Rights of the Parties, Its Standing is Sufficiently Impressive to Give Rise to a Claim that Non-compliance with Its Terms Constitutes a Grievance, Which Becomes a New Source of Difference and Friction Between Employer and Employes, and Induces the Application of Pressure to the Former by the Labor Organizations Representing the Latter.*

It is true that an award of the Adjustment Board does not in and of itself impose any technical legal obligation on the employer to comply therewith, in the sense that by non-compliance the employer does not incur any penalties by operation of law. The only way in which the award can be made to result in a legally enforceable liability is through a suit brought under Section 3 First (p) of the Act by the employes in whose favor the award has been issued, and, as has already been seen, such suits are in fact not brought and there is no reason to anticipate that they will be brought. Under these circumstances the contention may be advanced that the employer needs no relief against an improper or unlawful award of the Board because the award is legally a mere nullity and without legal consequences. Petitioner submits that this

argument is wholly unrealistic and formal, since judicial protection is frequently needed and usually granted against harmful practical consequences which invade legal rights, even though such consequences do not arise by operation of law. Accordingly, in determining whether or not judicial relief should be granted against an improper award, the decisive factor is not whether the award does or does not give rise to damage by operation of law, but whether in the absence of judicial relief it will subject the employer to damaging practical consequences which cause an impairment of legal rights. There can be no doubt that it is bound to have this effect.

An award of the Adjustment Board, wholly irrespective of whether or not it is legally enforceable and regardless of whether non-compliance therewith entails legal penalties, obviously is not a nullity but has the status of a pronouncement made under statutory authority by a body established for the purpose of making such pronouncements. Accordingly, so long as such an award is outstanding and is not shown by judicial decision to be at variance with the true rights of the parties, it carries with it a certain quality of authoritativeness, and can be appealed to by the employes in whose favor it was made as the only authoritative statement of the course of conduct which the employer owes to them. In other words, so long as it is outstanding without judicial correction, it affords in practice the basis for a claim by the employes that the employer in failing to comply therewith is guilty of a breach of duty. Such a claim obviously constitutes a grievance and a new source of difference and friction between employer and employes. In the present status of employer and employe relationships, the creation and existence of such a grievance is not a matter which can be ignored. It is a fact of importance, having not only practical consequences but legal implications as well. Thus it is well recognized that an outstanding grievance usually gives rise to an effort on

the part of the labor organizations involved to compel satisfaction by the exertion of so-called economic pressure, *i. e.*, by the exercise of the right to strike or to threaten a strike. That this consequence is likely to follow from non-compliance by the employer with an award of the Adjustment Board is not merely admitted but is insisted upon by the labor organizations in the railroad industry, as evidenced by the position which the respondents have taken in the case at bar. They have in fact taken the position that the reason why it should be held that this suit may not be maintained is in order that awards of the Adjustment Board may continue to be enforced by such economic pressure rather than by judicial proceedings. They frankly contend that the present suit ought not to be permitted, so that no obstacle may be placed in the way of the enforcement of the award here involved and other awards by the so-called collective bargaining power of the employes' organizations. Thus they say (R. 103):

> "The orders of the Board find their primary sanction in the collective economic bargaining power of the employees."

This is in accord with the statements made by Dean Garrison and Dean Spencer, already quoted above (pp. 103-5). In this connection Dean Spencer has said (p. 56 of his article on "The National Railroad Adjustment Board"; see p. 206 of Appendix to Compilation):

> "The labor organizations accordingly rely upon their collective strength to secure compliance with awards granted in their favor. If after the lapse of a reasonable time the carrier does not comply with an award or series of awards, the labor organization involved takes a strike vote."

It thus seems clear that, even though an award of the Adjustment Board does not in and of itself result by

operation of law in legal consequences which may be damaging to the employer, nevertheless non-compliance with an award places the employer in a position where it is exposed to very serious practical damage which will impair its rights unless judicially corrected. This is because, even though an award completely ignores the rights of the employer under the contract on which the award is purportedly based, as it frequently does, nevertheless the employer must either comply with the award, and thereby waive its contract rights, or else subject itself and the public which it serves to the inconvenience and losses resulting from the exertion of economic pressure by the employes. From these oppressive alternatives it can only be relieved by the availability of a real rather than a merely illusory access to the courts for a determination of its rights. It seems clear that the practical damage to which it would otherwise be exposed, and which would otherwise invade its legal rights, affords a sufficient reason why it should be entitled to such access despite the fact that non-compliance with the award in itself does not by operation of law entail any purely legal penalties.

(b) *Since the Possibility of Judicial Adjudication of the Employer's Rights Through Section 3 First (p) is Illusory, It Follows That if a Construction of the Railway Labor Act is Adopted Which Forecloses Judicial Relief to the Employer Through Any Other Form of Proceeding, Then the Employes by Bringing About an Adjustment Board Award Through Their Unilateral Action Can Place the Employer in a Position Where It is Effectively Cornered and Left Without Legal Recourse While Pressure is Being Applied to Compel It to Waive Its Legal Rights.*

What has been said in the immediately preceding subdivisions of this brief must be considered in connection with the fact, developed in an earlier section (pp. 82-92 above), that an award of the Adjustment Board may be

brought about by the purely unilateral action of the employes. If this fact is taken together with the consequences just pointed out of denying to the employer judicial relief except through Section 3 First (p), which amounts in effect to denying it altogether, the result sums up into an air-tight system of coercion which effectually deprives the employer of all rights whatever under its collective agreements with its employes, and makes those agreements mean in fact only what the employes through the exercise of sufficient pressure choose to make them mean. The operation of this system is clear from what has heretofore been said. The employes through their labor organizations, without the consent and against the will of the employer, file a claim with the Adjustment Board demanding that henceforth work shall be performed in a certain manner, with or without an additional claim that damages shall be awarded for its non-performance in that manner in the past. Irrespective of the appearance or non-appearance of the employer before the Board, the labor members and a referee proceed to make an award. The award sustains the claim and grants damages for the past, even though the claim may be directly in the teeth of the pertinent provisions of the contract between the parties, if the labor members of the Board are able by one means or another to convince the referee that such a result will better enable the parties "to conduct the business of interstate commerce without friction and without interruption." The labor organizations then give the employer to understand that, unless it complies with the award by changing its operating practices for the future and paying damages for the past, they will compel it to do so by economic pressure. The employer knows that, if a strike vote is taken and the controversy goes before the Mediation Board or an Emergency Board, those bodies will not concern themselves

with a determination of the legal rights involved.* Accordingly, if it is without a right of recourse to the courts to obtain such a determination, it has no choice but to yield to the pressure applied and forego its contract rights to whatever extent may be insisted upon by the employes. In short, the denial to the employer of the possibility of trying out its legal rights in a normal and orderly way before the courts crowds the employer into a corner where it has no choice but to waive those rights at the insistence of the other party. This is precisely the result which throughout the long history of the growth of law the processes of adjudication were developed to prevent. If such a result is now to be introduced into the field of labor relations, it means the disintegration of the legal order within the community into the ineffective and rudimentary processes prevalent between nations where agreements mean only what superior force can make them mean. It signifies the introduction into an important

* This was made evident in certain instances which occurred shortly after the enactment of the 1934 Act. Thus the National Mediation Board reported as follows in its First Annual Report (1935) (p. 29):

> "In one case, however, a strike of 4,500 employees was threatened because the employees insisted that the carrier was obligated to obey the decision, and *if any court action was to be taken the carrier should take the initiative in asking for a court order to set aside the award.*
>
> "In view of the threatened strike which would have seriously interrupted transportation service, the Board assumed jurisdiction on its own motion, not of the merits of the decisions of the Adjustment Board, but of the proper process of affirming or setting aside the awards. After 2 weeks of negotiations, an agreement was reached and the case amicably settled." (Emphasis supplied.)

Again, in its Second Annual Report (1936) the Mediation Board stated (p. 34):

> "Some railroad managements have insisted that the awards of the Adjustment Board were not enforceable and therefore have declined to make them effective, suggesting to the labor organizations that they present the cases to the courts. Employees have taken the position that the court procedure given to them did not take away from them the right to strike in order to compel compliance with the awards of the Adjustment Board. We have heretofore called attention to one case where trustees of a railroad in bankruptcy took this position, with the result that the employees took a strike ballot and when the Mediation Board intervened the case was settled with the aid of the United States District Judge. The same procedure has been followed in several other instances always resulting in an ultimate settlement without a strike."

field of law of what has been vividly called "international anarchy."

At the original argument a suggestion was made that, even if the employer were entitled to a judicial determination of its rights after an award had been made by the Board, and were successful in obtaining a decision adverse to the Board's award, this would not prevent the employes from striking to enforce the award if they so desired, and that, therefore, the judicial determination would be futile, ineffective and vain. A suggestion was also made that the courts ought not to be put in the position of possibly having to make a decision which the labor organizations would refuse to accept. The first suggestion, that a court's decision would be ineffective because the employes might strike against it, ignores the fact that there is at least an equal possibility that, as the Chief Justice pointed out during the argument, it might serve to "enlighten" them. The respect which they should have as citizens for the processes of justice might conceivably cause them to accept a judicial determination of their rights. At any rate the possibility of such an outcome might be regarded as sufficient to make resort to the courts not wholly vain. The second suggestion, that courts ought not to be put in the position of possibly having to make a decision which labor would refuse to accept, raises a more serious and fundamental issue. It raises nothing less than the issue of whether or not any group in the community, because of its strength, shall be treated as above the law and beyond the reach of the ordinary processes of adjudication. There can be only one answer to that question if civil society is not to be remitted to the rule of force or of so-called agreements and adjustments based upon the threat of force on the one hand and the fear of force on the other.

Apart from the pressure deliberately exerted by the employes, to which the employer would be subjected if denied an opportunity for judicial determination of its

rights, the employer if denied that opportunity would also be subject to another and very effective kind of pressure in favor of waiving those rights, because of the way in which an award of the Adjustment Board operates with respect to the accumulation of damages. This is clearly illustrated by the circumstances of the case at bar.

When a carrier in petitioner's position is faced with an award of the Board like that in the present case, requiring it to change its operating practices and to pay damages for not doing so, it has two alternatives before it. On the one hand, it can immediately comply with the award, take the work away from the employes who have been performing it, and thereafter permit that work to be performed by the other employes who have obtained the award. If it does this it will be sacrificing its contract rights and also in most instances, as in the case at bar, will be adopting a more expensive and less efficient method of operation, without any judicial determination as to whether or not it is legally obligated to do so. On the other hand, it can refuse to comply with the award and continue its practices as before. But if it adopts the latter alternative, even though the employes refrain from the exertion of economic pressure through the threat of a strike, each additional day on which the carrier continues to refuse to permit those employes to do the work will add to the amount which it will have to pay to them if it should ultimately be determined that the award of the Board is in fact in conformity with the legal rights and obligations of the parties. At the same time, on every such additional day that the carrier refuses to put the award into effect, it must continue of course to pay the other employes who actually do the work. It thus subjects itself, in short, to the possibility of what amounts to a double liability.

In other words, the total cost to the carrier in connection with the dispute in question would be very much less if it sacrificed its right to a judicial determination of

the issues and complied promptly with the Board's award, than the cost would be if it refused compliance and was ultimately compelled to yield to the employes' demands. If a carrier in petitioner's position is to be denied the opportunity to obtain judicial relief with reasonable promptness after an Adjustment Board award has been entered against it, there is no way for it to avoid the risk of having ultimately to pay out very much larger sums, except by prompt compliance with the award. It is obvious that under such circumstances the passage of time following the Board's award and the consequently continuing increase of the sum which the carrier may ultimately have to pay operates to increase constantly the pressure on the carrier to comply promptly with the Board's award. The result of denying the carrier access to the courts thus forces it to comply without a judicial determination as to whether or not it is legally obliged to do so, and in spite of the fact that compliance may unnecessarily and improvidently increase the costs and at the same time impair the efficiency of its operation to the disadvantage of the public which it serves.

These are precisely the circumstances which make prompt relief imperative in the interest of elementary fairness, and which the declaratory judgment procedure was devised to provide.

Since the employes as a matter of settled policy refuse to bring suit under Section 3 First (p) of the Act, and since the carrier has no other method of obtaining a judicial determination of its rights and obligations under its contract, a declaratory judgment proceeding becomes the only available means to petitioner for obtaining such necessary relief. If declaratory relief is granted and the carrier is thereby presently advised of its rights and obligations, it could if necessary change its operating practices promptly and thus save itself from a substantial portion of the heavy penalty payments demanded by respondents and accruing in their favor if their claim should prove to be justified. As stated by Judge Stephens

in his dissenting opinion below (p. 259 of 124 F. (2d); R. 356):*

> "In *Aetna Life Ins. Co.* v. *Haworth, supra,* the mere increase in the amount of insurance policy claims through the accrual of interest, and the inconvenience of having to be prepared to meet the claims at some future time, were held sufficient grounds for declaratory relief in respect of legal rights and obligations arising under insurance contracts. *A fortiori* the uncertainties and hazards to which the appellant under the facts stated in the instant case is subjected are sufficient to invoke exercise of declaratory jurisdiction. In *E. Edelmann & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, 854 (C. C. A. 7th, 1937), Lindley, District Judge, speaking for the court, said, in respect of the purpose of the Declaratory Judgments Act:
>
> > 'It was the congressional intent *to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued'.*" (Emphasis supplied.)

It follows from the above considerations that the denial to the employer of access to the courts after an award of the Board except in a Section 3 First (p) proceeding brought by the employes has the effect of placing the

* As a matter of fact, the majority of the Court of Appeals below did not deny that the present controversy would be an appropriate one for the exercise of declaratory judgment jurisdiction in the absence of special statutory impediment. However, the majority below took the position that such special statutory impediment existed in the present case, in that Section 3 First (p) must be construed as manifesting a Congressional intent that the judicial remedy therein provided should be exclusive of all other methods of judicial determination of the rights of the parties, in order to preserve to the employes the advantages which they have in a Section 3 First (p) proceeding and which Congress must have intended them to have. This position of the majority of the Court of Appeals is discussed and answered at pages 172-82 below.

employer in a position where, because of the nature of the award and its operation to increase from day to day the employer's potential liability, and as a result of the economic pressure which the employes are able to exert and do exert most effectively through their collective power, the employer is coerced into complying with the employes' wishes, as expressed in the Board's award. It likewise follows from what has been said that respondents are in error in claiming that Section 3 First (p) provides an adequate opportunity to the employer for a judicial determination of its rights and also in contending that the compulsion to which the employer is subject is "extra-legal" and therefore should not be recognized or considered by the Court.* Certain additional contentions of respondents in this respect remain to be considered.

3. The Contention of Respondents that a Suit Brought by the Employes Under Section 3 First (p) Affords the Employer an Adequate Opportunity for Judicial Relief, and Should Therefore be Held to be Exclusive, Because of Similarity Between the Language of Section 3 First (p) and the Language of Certain Sections of the Interstate Commerce Act and the Packers and Stockyards Act Providing for Statutory Reparation Suits Under Those Acts, Is Unfounded, Because the Analogy Is Inapt and Because Construction of Those Provisions of the Interstate Commerce Act and the Packers and Stockyards Act as Providing Exclusive Remedies Would Not Have the Same Actual Effect as Would the Construction of Section 3 First (p) of the Railway Labor Act for Which Respondents Contend.

The argument presented above to show that, in view of the nature and operation of Adjustment Board awards,

*For further discussion of the reality and effectiveness of the compulsion to which the employer is subject and of the question whether or not it is "extra-legal" and whether or not it should be considered by the Court, see pp. 232-38 and 242-49 below.

the employer is not afforded an adequate or proper opportunity for judicial relief by the statutory suit provided for employes under Section 3 First (p) serves also to answer and refute the contention which respondents have advanced on the basis of a supposed analogy between Section 3 First (p) and the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act.

Respondents have contended that, in spite of the consequences pointed out above which would inevitably follow from denying to the employer all right of access to the courts save in a proceeding under Section 3 First (p), nevertheless such a result is required because the language of Section 3 First (p) closely follows the provisions of the Interstate Commerce Act and the Packers and Stockyards Act relating to reparation suits under those statutes. Respondents claim that these reparation suit provisions provide an absolutely exclusive judicial remedy with respect to the situations to which they are applicable, and that therefore, since similar language is used in Section 3 First (p) of the Railway Labor Act, the remedy provided by that section must likewise be held to be exclusive, irrespective of the consequences to the employer.

The first answer to this contention is supplied by the elementary rule of law that, in spite of identity of language, statutory provisions will not be given an identical construction where there is such difference in the subject matter and operation of the provisions in question as to make identity of construction inappropriate. Where such difference in subject matter and operation exists, the two statutes are said to be not *in pari materia;* and the rule is that similar or identical statutory language will be given a similar or identical construction only where the two statutes are *in pari materia.* It will be shown below that the nature and consequences of an Adjustment Board award are so essentially different from those of a reparation order of the Interstate Commerce Commission that

in the former case the results of denying to the employer access to the courts are oppressive and arbitrary in a sense which is not true with respect to the statutory procedure for enforcing reparation orders of the Commission. Accordingly it follows that, whatever construction may have been placed, or should properly be placed, on the reparation-suit provisions of the Interstate Commerce Act, such construction is not controlling or persuasive with respect to the construction of Section 3 First (p) of the Railway Labor Act.

There is a second answer to this argument which respondents seek to draw from the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act. This is that, as will be shown below, the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, as respondents seem to suppose, but have simply been held to require that, where the statutory suit for reparation is available, certain other remedies, as, for example, an injunction suit under the urgent Deficiencies Act to set aside the order, are not available.

These two answers to respondents' efforts to avail themselves of the supposed analogy of the reparation-suit provisions of the Interstate Commerce Act and the Packers and Stockyards Act will now be developed in greater detail.

(a) *The Rule that Identical Statutory Provisions Should Ordinarily be Given Identical Construction Does not Apply Because of Important Differences Between the Statutes in Question, viz., the Interstate Commerce Act and the Railway Labor Act, and those Statutes Are Therefore not in Pari Materia and not to be Construed Alike.*

Identity in the language of two separate statutes does not lead to identity of construction where the two statutes are not *in pari materia, i. e.*, where they are not similar

in objects and purposes and in the type of circumstances to which they apply. This is firmly settled in the cases.

A classic statement of the rule is that given by the Circuit Court of Appeals for the Eighth Circuit (including Circuit Justices Sanborn and Van Devanter) in *United States* v. *Colorado & N. W. R. Co.*, 157 F. 321 (1907), at page 330, as follows:

> "The rule in pari materia • • • the rule that the similar terms of statutes enacted for like purposes should receive like interpretations, is inapplicable • • • because the evils to be remedied, the objects to be accomplished, and the enactments requisite to attain them are radically different."

It would seem to require no argument to show that a statutory provision designed to enable individual shippers to collect money damages for past exactions of unlawful rates is directed against an entirely different evil and seeks to attain an entirely objective from another statutory provision designed to enable employes to compel their employer to assign to them in the future work to which they claim a right under a contract, and to exclude others from the performance of that work. The remedy provided by Section 16(2) of the Interstate Commerce Act is available only in the case of non-compliance by a carrier "with an order for the payment of money." The remedy provided by Section 3 First (p) of the Railway Labor Act covers any order of the Adjustment Board. The order of the Adjustment Board involved in the present case, and indeed most awards and orders of that Board, are in effect directions to the carrier as to its future operating practices, as well as orders to pay money damages. By sustaining a claim, the Board, in substance, says to the carrier that it must henceforth permit certain men to do certain work and not allow other men to do that work, and must also pay money damages for each day in which the claimants are not permitted to do the work.

A legal proceeding to give effect by mandamus to a claim of that kind is altogether different in its incidents, consequences and repercussions from a suit merely to recover a sum of money. Accordingly, the grounds on which it might be held that a statutory action to recover a certain sum of money was by implication exclusive of all other forms of judicial remedy would have no necessary applicability to the determination of whether or not the statutory proceeding to enforce a claim to certain work was exclusive. By their difference in terms, the one statute referring only to money claims and the other covering claims to enforce future conduct, the two statutory provisions differ in such essential particulars that rulings with respect to one are not controlling with respect to the other, under the *in pari materia* rule above stated.

Furthermore, the situations and circumstances to which Section 16(2) of the Interstate Commerce Act and Section 3 First (p) of the Railway Labor Act are respectively applicable differ in such significant and material respects that a construction appropriate to the one provision would not be appropriate to the other.

Attention has already been called above (pages 113-23) to the economic pressure to which a carrier-employer is subjected, under the facts of this case, to comply with the award without a judicial determination of its rights. This pressure is not present in the case of mere claims by individual shippers for money damages based on past transactions which do not affect operating methods for the future. The significance of an award of the Adjustment Board with respect to the future operating practices of the carrier lends an altogether different and more pressing character to the carrier's need for judicial determination of its rights than is the case in connection with a reparation order of the Interstate Commerce Commission. Not merely must the carrier run the risk of choosing between immediate compliance with the award of the Adjust-

ment Board by a change in its method of operation or of having to pay a much larger sum, if the claimant ultimately brings the statutory action and the claim is sustained, but the carrier is furthermore exposed, as already pointed out, to the pressure of the economic bargaining power of the employes. None of this pressure is present in the case of a reparation claim for damages under the Interstate Commerce Act. The presence of such pressure in the one case and its absence in the other establishes such a plain difference between the two statutes—a difference which is reflected in the fact that one statute is expressly limited to money claims while the other is not—that under the *in pari materia* rule it seems clear that a construction of the one statute giving a quality of exclusiveness to the remedy therein provided is not by necessary or even reasonable implication transferable to the other.

(b) *The Decisions Under the Reparation-Suit Provisions of the Interstate Commerce Act Do not Go so Far as to Establish Any Absolute Rule of Exclusiveness, but Simply Hold that Where the Statutory Suit for Reparation is Available Certain Other Remedies are not Available.*

The considerations just advanced impel the conclusion that, even if Section 16(2) of the Interstate Commerce Act and the analogous provisions of the Packers and Stockyards Act had been so construed as to provide that the statutory actions created by those Sections were absolutely and in all respects exclusive of all other forms of judicial remedy, it would not follow by necessary implication that a like quality of exclusiveness must, as respondents contend, attach to the statutory remedy under Section 3 First (p) of the Railway Labor Act. However, the decisions under the reparation-suit provisions of the Interstate Commerce Act do not go so far as to establish any absolute rule of exclusiveness, but have simply held that where the statutory suit for reparation is available certain other statutory remedies are not available.

Thus, for example, it has been held that, where the Interstate Commerce Commission has made a reparation order so as to entitle the successful claimant to bring an action under Section 16(2), the order of the Commission is not of such a character as to conform to the definition of an order under paragraph 28 of Section 41 of the Judicial Code authorizing suits to enjoin certain orders of the Commission, and accordingly a statutory suit to enjoin a reparation order may not be brought under that section: *Baltimore & O. R. Co.* v. *United States*, 87 F. (2d) 605 (C. C. A. 3rd, 1937). Likewise, in the earlier case of *Brady* v. *Interstate Commerce Commission*, 43 F. (2d) 847 (N. D. Va., 1930), it was said that, since a reparation order is not enforceable by the Commission, a suit for a statutory injunction under that section of the Judicial Code will not lie against the Commission to restrain or set aside the order.

These decisions are wholly intelligible without the necessity of presupposing any absolute rule that the judicial remedy provided by Section 16(2) of the Interstate Commerce Act is exclusive of all other forms of judicial relief. Their holding has no direct bearing upon the disposition of the case at bar. The present proceeding is not a suit for an injunction. If it were, it would have been brought against the National Railroad Adjustment Board in Chicago. Petitioner is not contending that the award of that Board can be enjoined. On the contrary, petitioner is here contending merely that the award should not operate as a bar to the exertion of petitioner's present legal rights, including the right to have its contract relations with the respondent adjudicated in a proceeding for a declaratory judgment.

Respondents have asserted below that the statutory procedure under Section 16(2) of the Interstate Commerce Act operates to bar a shipper who has failed to win an award before the Interstate Commerce Commission from subsequently proceeding in court against the carrier, and

have cited for this proposition *Minds* v. *Pennsylvania R. Co.*, 237 F. 267 (E. D. Pa., 1916) (see R. 108), thereby seeking support for the contention that because of Section 3 First (p) of the Railway Labor Act an employe who has failed to win an award from the Adjustment Board is henceforward barred from any form of judicial relief on his contract rights against the employer. The *Minds* case was a suit by a claimant who had been successful before the Commission, and is, therefore, not authority for the proposition for which it is cited. In fact it now seems to be clear that a shipper who has been refused relief by the Interstate Commerce Commission is not by that fact alone necessarily barred from resort to the courts: *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 136-44, 59 S. Ct. 754, 760-64 (1939). Petitioner will demonstrate below (pp. 167-72) that an employe whose claim has been denied by the National Railroad Adjustment Board may nevertheless sue the employer on his contract under the general jurisdiction of the courts. But even if it should be held that he may not, this would not preclude the employer from a right to sue, since the position of the employer against whom an award has been entered, without its consent even to have the controversy submitted to the Board, is so essentially different, and its need for judicial relief is correspondingly so much greater (see pages 113-23 above), that the considerations which would apply to the employer are not the same as those upon which the right of the employe to sue might be denied after such employe has voluntarily chosen the Board as his forum for relief and has failed to win its support for his claim. Moreover, as will be shown below (pp. 188-91), if the employe should be held to have waived his right to resort to the courts as a result of his voluntarily electing to have his claim determined by the adjustment procedure, the employer would not be barred by any such reason from resort to the courts, because the employer's appearance before the Adjustment Board in response to the employe's

unilateral submission does not constitute in any sense a voluntary choice or election of the adjustment method by the employer.

It follows from what has been said above, first, that even if it were true, as respondents contend, that the cases establish an absolute rule of exclusiveness with respect to the methods of review provided in Section 16(2) of the Interstate Commerce Act and in the analogous sections of the Packers and Stockyards Act, nevertheless those provisions of the Interstate Commerce and Packers and Stockyards Acts cannot be considered to be *in pari materia* with Section 3 First (p) of the Railway Labor Act, and therefore do not provide an apt statutory analogy to that section, and second, that the cases do not in fact establish any such absolute rule of exclusiveness even with respect to the methods of review provided in those sections of the Interstate Commerce and Packers and Stockyards Acts. Accordingly, respondents' appeal to the supposed analogy of the reparation-suit provisions is wholly ineffective to refute petitioner's contention, established above, that the employer will be completely deprived of any adequate opportunity for judicial protection of its rights if, after an award by the Adjustment Board, the statutory procedure through Section 3 First (p) of the Railway Labor Act should be held to be exclusive.

4. The Inadequacy of the Judicial Relief Available to the Employer, If Its Right of Access to the Courts After an Award of the Adjustment Board Should Be Held Limited to a Proceeding Brought by the Employes Under Section 3 First (p), is not Cured or Compensated by the Opportunity Which the Employer Would Supposedly Have Under the Doctrine of the Moore Case to Resort to the Courts Prior to the Submission of The Dispute to the Adjustment Board by the Employes.

Assuming that the *Moore* case was properly decided and that either party is entitled to resort to the courts,

prior to submission of the dispute to the Board, for a judicial consideration and determination of the controversy, it may be contended that the opportunity thus given the petitioner after the dispute arose is sufficient to protect its legal rights, and that a right of access to the courts after submission of the dispute to the Adjustment Board is not needed by the petitioner as an additional safeguard. This is in fact suggested in the opinion of the majority below, where it is said (p. 249 of 124 F. (2d); R. 345):

> "• • • the carrier, under the decision in *Moore* v. *Ill. Central R. R., supra,* can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act."

Thus, the majority below seem to say that the opportunity given the employer under the doctrine of the *Moore* case to resort to the courts prior to the submission of the dispute to the Adjustment Board is adequate to protect its legal rights.

But it is not true that the need of the employer—shown above to be a very real one—for judicial relief after issuance of an award of the Board is rendered non-existent by virtue of the fact that petitioner could have gone into court, under the doctrine of the *Moore* case, before the dispute was submitted to the Adjustment Board by the employes. It has been shown above (pp. 82-92) that, when the employes have made their election and have submitted the dispute to the Adjustment Board, the employer, even though the submission was without its consent, has no practical alternative except to appear before the Board and defend itself as best it can against the unilateral submission. Therefore, if the only opportunity which the employer is to have for judicial relief in the courts is between the time the dispute arises and

negotiations on the property have ended, on the one hand, and the time of submission of the dispute to the Board by the employes, on the other hand, then every such situation will be likely to produce a race between the employer, seeking to get into court, and the employes, seeking to submit the dispute to the Board. Surely it was not the intent of Congress to instigate such a race between the parties, and the discussion above has shown that neither the legislative history nor any alleged policy of the Act indicates such an intent.

Throughout the dispute the employes are the claimants, and the initiative therefore lies with them to determine what remedy should be employed for the purpose of seeking enforcement of their claim. The employer should not be required to anticipate what course the employes will choose and to act in advance of their choice, at the risk of making a wrong guess. To hold that the employer is thus compelled to anticipate the employes' choice of remedies, at the risk of losing altogether its opportunity for judicial consideration of the controversy, would mean that the employer would have no practical alternative but to take every dispute into the courts, as promptly as possible, in order to attempt to forestall submission by the employes of the dispute to the Board. Such an interpretation of the Act would certainly result in the submission to the courts of many more cases of disputes between rail carriers and their employes than would otherwise occur, since many of the disputes would be ones which might otherwise be finally "adjusted" by an award of the Adjustment Board, or which the employes themselves might recognize as not having sufficient merit to press beyond the stage of negotiations on the property.

Thus, to hold that the employer's only opportunity for judicial consideration and determination of a dispute with its employes is in a suit instituted by the employer before the employes have submitted the dispute to the Adjustment Board would result in a race between the

employer and the employes, the employer in pursuit of the only remedy available to him and the employes in pursuit of the remedy which they prefer and which promises them greater success in attaining their desired result. If the employer should be successful in that race in all or most instances, it would mean the submission to the courts of a great number of such disputes which otherwise might not find their way into the courts. But the probability is that the employer would not be successful in that race in all or even many instances of disputes, since the machinery for submitting disputes to the Adjustment Board is much simpler and more readily available than is the procedure for getting into court. All that the employes have to do in order to set in motion the Adjustment Board machinery is to write a letter to the Board, saying that they intend to submit a particular dispute, and the Board then notifies the carrier that the employes' so-called "submission" or statement of its claim with respect to that dispute will be filed on a given day, and the employer's statement may be filed on or before the same day. It might very well be successfully contended by the employes that this invocation of the Adjustment Board's machinery was sufficient to constitute a submitting of the dispute to the Board for the purpose of excluding subsequent resort by the employer to the courts. On the other hand, before a proceeding can be properly instituted in court, consideration must be given to the choice of venue and forum, an adequate complaint must be prepared, and service thereof must be made on all necessary parties. Even after these preliminary steps have been taken, the complaint may be subject to a demurrer or motion to dismiss or other pleading raising questions of lack of jurisdiction, and if such plea to the jurisdiction is successful, then another proceeding must be begun and the same preliminary steps must again be taken.

Obviously, under such circumstances the race between the employer and the employes would in many and prob-

ably in most instances be won by the employes. Moreover, let it be supposed that the employer did win the race in some instances and was successful, for example, in reaching the courts with respect to a case involving a particular operating practice, prior to submission of the dispute to the Board. Let it also be supposed that the court decided the case in favor of the employer. Unless the employer was able to take into court every instance of a claim by an employe arising out of the same operating practice and involving the same question, the employes could, notwithstanding the court's decision, submit the next dispute involving the same practice and the same question to the Board, and there would of course be no assurance that the court's decision would be followed by the Board, which might very well reach its own independent conclusion on the matter, based on a supposed desire to arrive at an "adjustment." Therefore, unless in the case of every claim brought by an employe the employer could manage to reach the courts prior to submission of the dispute to the Board, regardless of whether the claim involved exactly the same questions as those previously adjudicated by a court, the opportunity to resort to the courts under the doctrine of the *Moore* case would not provide the employer with the judicial relief needed, since the employes could place the employer in the same position in which it would find itself if it had no such opportunity, by obtaining from the Board an award sustaining their position despite the prior court decision to the contrary. Thus, if the employer's only recourse to the courts should be held to be that available to it under the doctrine of the *Moore* case prior to submission of the dispute to the Board, then it would be necessary for the employer to maintain a perpetual race with the employes and to attempt to take every individual claim into court prior to submission of that claim to the Board. It is plain not only that such a perpetual race was never intended by Congress but also that it would be impossible for the employer to succeed in it.

In the face of these facts it cannot be claimed that the employer's opportunity to resort to the courts prior to submission of the dispute to the Adjustment Board by the employes provides the employer with an adequate judicial remedy to protect its legal rights. Clearly, such a remedy would in fact be illusory, since in many or most cases the employer would have no opportunity at all to get into the courts before its access thereto was barred by submission of the dispute to the Adjustment Board, and in such cases the employer would in fact be deprived altogether of access to the courts for a judicial determination of its rights and obligations.

But, even if adequate opportunity were available to the employer, under the doctrine of the *Moore* case, to resort to the courts prior to submission of a dispute to the Board, this would nevertheless not provide the employer with the opportunity which it needs for judicial relief, since, for the reasons shown above (pp. 113-23), the mere existence of an award of the Board creates in and of itself a need for the employer to have access to the courts in order to obtain a judicial determination with respect to the issues involved in the Board's award. As shown above, an award of the Board, even though not legally enforceable as such, has nonetheless a certain quality of authoritativeness, and so long as the award is outstanding without judicial correction, it constitutes a grievance giving rise to a new claim by the employes. The award thus constitutes a new source of difference and friction between employer and employes, which stimulates an effort on the part of the labor organizations involved to exert their economic power for the purpose of compelling compliance with the award, and the fact that the award is an authoritative pronouncement by a body created under statutory authority lends added strength and insistence to the exercise of economic pressure by the employes. Furthermore, the mere existence of the award representing as it does a

potential liability of a continually increasing amount, constitutes, as pointed out above, a danger to the employer which may result in its being compelled ultimately to pay much more if it should refuse compliance than would be the case if it waived its legal rights and complied immediately with the award. If the employer is not to be compelled either to yield to this combined pressure, at the sacrifice of its legal rights, or to run the risk of suffering the serious inconvenience and losses resulting from full application of the pressure, it must have a real and substantial opportunity to resort to the courts for judicial relief after an award of the Board has been issued.

Clearly, therefore, for these reasons, the employer's need for judicial relief subsequent to the submission of a dispute to the Adjustment Board by the employes and the issuance by the Board of an award with respect thereto is not satisfied or eliminated by the limited and inadequate opportunity which the employer may have, under the doctrine of the *Moore* case, of resorting to the courts prior to submission of the dispute to the Board.

**C. The Policy of the Railway Labor Act Does not Require That It Should Be Construed So as to Produce the Arbitrary and Oppressive Results Which Would Follow from Denying the Employer Access to the Courts on Its Own Initiative After an Award of the Board.**

In the preceding sub-divisions of this section of the brief it has been shown that, if after an award of the Adjustment Board the employer is permitted no other form of judicial relief than that afforded in a suit brought by the employe under Section 3 First (p), the employer will actually be deprived altogether of an opportunity for judicial determination of its rights.

That the Railway Labor Act should be construed to require this result by implication has been urged by the

respondents on grounds drawn from the alleged "policy" of the Act. This argument will now be examined and will be shown to be without foundation save by assuming the point to be proved.

Respondents throughout their argument in the courts below suggested, sometimes expressly and sometimes by implication, that to allow the employer to seek judicial relief after an award by the Adjustment Board would be contrary to the broad "policy" of the Railway Labor Act and would render the provisions of that Act unworkable. It was intimated that if the employer were accorded such a right, the use of the adjustment procedure would be discouraged, adjustment awards would become futile and lose their effect, litigation would be unduly multiplied, and a supposed Congressional intent of "making resort to the Courts unattractive to the carriers" would be defeated (Defendant's Memorandum Brief, pp. 37-38, 40-41; R. 103-104, 106-107).

It will be shown below that it was clearly not the intent of Congress to prevent claims which had been "adjusted" by an award of the Adjustment Board from being thereafter subjected to judicial re-examination by a court; that therefore Congress cannot be said to have entertained the view that judicial re-examination of such claims would defeat the effectiveness of the adjustment procedure or render Adjustment Board awards futile and ineffective; and that the only basis for attributing to Congress any supposed intent of "making resort to the Courts unattractive to the carriers" is to assume the very point to be proved, and attribute to Congress, without any foundation therefor, an intent to place the employer in a position where, as a result of being denied access to the courts, it can be effectively coerced into complying with awards irrespective of whether or not they disregard the terms of its contract.

1. Congress Had No Intention to Exclude the Possibility of Judicial Determination of Controversies Which Have Already Been Submitted to the Adjustment Board, Since Section 3 First (p) Expressly Provides for Judicial Re-examination of Controversies Already "Adjusted" by Awards of the Board.

It is clear that Congress had no intention to exclude the possibility of subsequent judicial determination of controversies which have already been submitted to the Adjustment Board. The existence of such an intent is negatived by the inclusion in the statute of Section 3 First (p), concerning which so much has already been said. Certainly it is to be assumed that Congress in incorporating that section in the Act was acting in good faith and with the intention and expectation that the section would be used, although, as has been seen, that hope has been frustrated by the policy of the labor organizations. If Congress did act in good faith, it is clear from the provisions of the section that Congress saw no incompatibility between the adjustment procedure of the Act and the possibility that a controversy which had been the subject of an Adjustment Board award should thereafter be fully re-examined judicially in a court of law.

In this connection, a feature of this judicial re-examination of the controversy as contemplated and intended by Congress is worthy of note. Section 3 First (p) provides that when a suit is brought under its provisions the suit shall be not upon the award of the Adjustment Board itself, but on the claim—"the causes for which he [the plaintiff] claims relief"—and it is provided that in such a suit the findings and order of the Adjustment Board shall merely constitute *prima facie* evidence of facts. This can only mean that the suit is to be upon the original claim under the contract between the parties,* which is thus brought directly before the court for interpretation

*See also discussion of this point at pp. 27-30 above.

without regard for the "adjustment" arrived at by the Board, and the Board's action is regarded only to the extent of according *prima facie* effect to its findings of fact where such findings have been made. This is precisely the provision which might be expected, in view of the nature and functions of the Board, its method of proceeding, and the fact that the Board's award may be an "adjustment," arrived at without regard to the parties' contract rights. Clearly no such adjustment made by such a body without regard to contract rights ought to be imposed, or could properly be imposed, on the parties by law or by the action of a court; and accordingly in a proceeding under Section 3 First (p) the court is required by the terms of the statute to enforce not the award but only the legal rights upon which the claim is founded.

It appears from this examination of the nature of the suit provided for by Section 3 First (p) that Congress was not only not hostile to, but actually contemplated and intended, a full judicial re-examination and determination of the contract rights of the parties after an award of the Adjustment Board, before the employer could be obliged to comply therewith. It may be remarked in passing that this is doubtless the reason why labor organizations decline to make use of the procedure set up under Section 3 First (p). They recognize that if, as is often the case, an employe obtains from the Board an award embodying a favorable adjustment which goes beyond his contract rights and involves a disregard of the rights of the employer, the employe will not be able to sustain such an award in court in a proceeding under Section 3 First (p). Accordingly they avoid the risk of such a result by the policy of not making use of the procedure provided for by that section. However, this policy of the labor unions does not and cannot alter the intent of Congress expressed in the statute; and so far as that intent is concerned, it is apparent from the statutory pro-

vision that Congress saw no incompatibility between the adjustment procedure which it was establishing and the possibility of a full judicial re-examination in court of the contract rights of the parties after the adjustment procedure had resulted in an award of the Board.

This is again what might be expected in view of the nature and purpose of the adjustment procedure, so long as that procedure is recognized as having the purely voluntary character attributed to it by this Court in the *Moore* case. If the adjustments made by the Board are recognized as voluntary, then there is nothing inherently oppressive or inconsistent with legal rights in permitting the Adjustment Board to formulate awards which may depart from the contracts of the parties, provided that it is clear that the parties are free to accept those awards or not, as they choose. If this is clearly recognized, it may very well happen that for one reason or another an employer may be willing to accept voluntarily an adjustment made by the Board in disregard of the employer's strict contract rights, and the employer would of course be free to do so. However, the Act makes clear in Section 3 First (p) that the employer may not be compelled to do so by court action; and if an effort should be made to enforce the award by the processes of law, then the Act provides and Congress intended that there shall be a full judicial consideration and determination of the parties' legal rights.

This provision of the Act also makes intelligible the fact, already discussed in an earlier section of this brief in response to the Court's second question, that an award may be entered by the Adjustment Board against the employer at the sole instance of the employe and even if the employer does not appear in the proceedings before the Board. Clearly, under such circumstances an award which would "adjust" the dispute in disregard of the employer's contract rights would, if capable of enforcement, be a violation of the most elementary principles

of justice. However, in the light of what has just been said, it is not capable of enforcement. The employer is free to accept the award voluntarily if it cares to do so. If, however, it refuses, the award can only be "enforced" at law through a proceeding under Section 3 First (p), in which the employer will have an opportunity to appear and present its case, and in which the contract rights of the parties will be fully examined and no decree entered which is not in accord with those rights.

It is thus not merely consistent with the Congressional scheme for "adjustment," but is actually required for the purpose of preserving the voluntary character of that scheme, that after the action of the Adjustment Board there should remain an opportunity for a judicial consideration and determination of the parties' contract rights in order that adjustments which disregard those rights, but which might be satisfactory to the parties if accepted voluntarily, may not be imposed upon and enforced against one of the parties without its consent. Provision to this effect is accordingly made in Section 3 First (p), as noted above, if the employes seek to enforce their claim by legal action. If, however, in order to avoid this result, they astutely refrain from using Section 3 First (p) and seek to enforce an award by pressure and coercion, it is clearly not inconsistent with, and is actually required by, the Congressional intent and purpose that the employer should have a like opportunity for a judicial determination and declaration of its contract rights. The only grounds of supposed policy which could be alleged against such a right of access to the courts by the employer are grounds which could be urged with equal force against the procedure under Section 3 First (p); and the fact that those grounds are not applicable is shown by the incorporation by Congress of Section 3 First (p) in the Act.

2. The Availability of Judicial Redress to the Employer Would Have No More Effect Than Would the Judicial Redress Available to the Employes Under Section 3 First (p) in Unduly Multiplying Litigation, and Would Strengthen Rather Than Weaken the Standing and Effectiveness of Adjustment Board Awards.

It is said that, if judicial redress is available to the employer in one case after an award of the Adjustment Board, it must necessarily be available in all cases (Defendant's Memorandum Brief, pp. 40-41; R. 106-7), which is of course true; and, in addition to the implication that this would unduly multiply litigation, it is also said that it would have "undesirable effects * * * upon the Board" (R. 107) and "seriously interfere with the operations of the Board" (R. 106). The answer is that if these results would follow from allowing the employer access to the courts, they are no different from the consequences which would follow if employes actually took advantage of the invitation held out to them by Section 3 First (p) to resort to the courts, as Congress obviously intended them to do. In other words, assuming that judicial proceedings after an award would multiply litigation and interfere with the operations of the Board, there is no reason to suppose that litigation would be multiplied to any greater extent, or that the operations of the Board would be interfered with any more seriously, if such proceedings happened to be instituted by the employer than if they were instituted by the employe under Section 3 First (p).

It is no answer to this conclusion to say that employes do not in fact bring suits under Section 3 First (p), since the point under discussion is the intention of Congress, and as to this no relevant evidence is afforded by what the employes may or may not in fact do. What is relevant is that it was evidently the intent of Congress that the employes should be free to bring suit in court on every favorable award of the Board if they cared to do

so. This would certainly open the doors as wide to litigation, and would to that extent multiply litigation as greatly, as if the like right of the employers to institute suits were recognized, since under the provisions of Section 3 First (p) every award in favor of an employe without exception is potentially the subject of a law suit.

The spectre of excessive litigation is no more impressive and should be no more persuasive in the present connection than when urged as an argument generally against the right to judicial review of the determination of quasi-judicial administrative boards and commissions. It is established that there is a right to such review (see pp. 238-44 below), which means that every such determination may issue in a potential lawsuit. This possibility can be presented as fraught with the danger of clogging the courts and destroying the effectiveness of administrative action. The reason why this is not deemed a sufficient reason for denying access to the courts is two-fold. In the first place, even if the danger were actual it would only mean that, where new rights and obligations emerge as a result of new legal and social relationships, it is no excuse for denying recognition to those rights and obligations in the courts, that the result would necessarily be to increase the business of the courts. The second reason is that the alleged danger is not real. Just as only a few of the vast number of contracts entered into ever find their way into the courts and become the subject of judicial inquiry and determination, so in actual experience only a few of the total number of administrative determinations are brought to the test of judicial review. In the same way there is no reason to expect that, if the right of the employer to resort to the courts after an award by the Adjustment Board were recognized, the right would be exercised in any sufficient number of cases to increase substantially the business of the courts, even if that possibility were regarded as a valid ground against recognition of the

right, which of course it is not. The reasonable expectation is that it would be exercised only in border-line cases, where the Board's disregard of the contract of the parties appeared to be clear and definite, and only in a sufficient number of cases to serve notice on the Board that if it wished to have its awards voluntarily accepted it must keep sufficiently within the limits of the terms of the contract and of contract law to show some regard for the interests and wishes of both parties to the contract rather than merely for those of the employes.

These considerations supply the answer to the argument that if the employer were allowed an opportunity for judicial relief this would have "undesirable effects * * * upon the Board," and would "seriously interfere with the operations of the Board." Exactly the opposite result might be expected to follow. As a matter of fact, the operations of the Board are now seriously interfered with because of the employers' lack of confidence in the fairness of its awards and because of their belief that the Board pays no proper regard to contract provisions. In consequence, they resist claims as strongly as they can. At the same time the employes are tempted to advance claims that go far beyond anything that would occur to them as reasonable if they understood that the Board was to function within the limits prescribed by the contracts of the parties. As a result, there has been an excessive multiplication of claims, which has clogged the dockets of the Board, especially the docket of the First Division.

There can be no doubt that these conditions, which obstruct the operations of the Board and more particularly of the First Division, would be greatly alleviated if there were more respect for the Board's decisions. A large number of unjustified claims designed to work a silent and surreptitious amendment of contracts without the employer's consent would be eliminated. In other cases the Board, having the confidence of the parties, would be in a better position to aid in working out satisfactory settle-

ments. Both these desirable results might be expected to follow if the Board would from time to time be "enlightened" by a judicial determination of some of the controversies upon which it has acted. Guiding decisions established by the courts in such cases should assist the Board in recognizing the proper limits of its functions so that by remaining within those functions it could build up a respect for its decisions which would lead to fewer and fewer of them being taken into court. Obviously this would promote the efficiency of the Board and would facilitate rather than interfere with its operations.

3. If Congress Had Intended That the Employer Should Be Excluded from Access to Judicial Relief After an Adjustment Board Award, It is Reasonable to Suppose That It Would have so Constituted That Board as to Insure That It Would Act in a Judicial or Quasi-Judicial Manner, and Would not Have so Framed Its Legislation That It is Impossible for the Board Even to Adopt Rules of Fair Procedure.

If, in spite of what has been said above, it should be assumed, solely for the purpose of argument, that Congress did intend to exclude employers from the courts after an award of the Adjustment Board and thereby make such awards final against them, it seems reasonable to suppose that Congress, if it had any such intent, would have so constituted the Board as to insure that it would act in a judicial or quasi-judicial manner. Accordingly, the absence of such intent on the part of Congress may properly be inferred from the fact that it did not do this, but on the contrary so framed its legislation as to leave the Board in a position where, because of its bi-partisan character and because there is no provision for calling in a referee to break deadlocks on the adoption of procedural rules, it is even incapacitated from adopting elementary rules of fair procedure (see p. 49 above).

Of course petitioner does not admit that it would be constitutional to commit the final and conclusive deter-

mination of contract rights to a non-judicial agency, even though such agency were organized along the usual lines of a regular administrative tribunal fully complying with all the standards of quasi-judicial action. But, leaving the constitutional question aside, it seems plain that if the Adjustment Board was in fact intended by Congress to make what would amount to final decisions concerning the interpretation and application of agreements, the Board would have been so constituted as to act at least quasi-judicially. Certainly it cannot reasonably be conceived that Congress, by implication and without an express indication of its intent, designed that one of the parties to a contract should be effectually shut out from a judicial determination of its rights by the action of an agency whose procedure may be entirely appropriate to facilitate voluntary adjustments, but is completely lacking in the very elements of a fair trial. Therefore, it would seem far more consistent with the purpose of Congress to hold that after an Adjustment Board award the employer may have access to the courts than to exclude the employer from such access and thereby enable the action of a completely non-judicial body to determine finally and conclusively the employer's contract rights.

4. There is Nothing to Indicate, as Respondents Tacitly Assume, That Congress Intended to Place the Employer in a Position Where, as a Result of Being Denied Access to the Courts, It Can Be Coerced by Pressure Into Complying with Awards of the Adjustment Board; and the Availability of Judicial Relief to the Employer as well as to the Employes Would not Render the Adjustment Provisions of the Railway Labor Act "Unworkable" Unless it is Assumed at the Outset That the Purpose of the Act is to Make it Possible for the Employes to Coerce the Employer by Pressure into a Waiver of Its Legal Rights.

If it should be decided, as respondents urge, that suits like the present one may not be maintained, and that it

was the intent of Congress that the employer's right to judicial relief lies exclusively through a suit which the employes may or may not choose to bring under Section 3 First (p), this can only mean that Congress must have intended the adjustment procedure of the Railway Labor Act to operate in the following manner: First of all, an employe or a labor organization by filing a claim with the Adjustment Board can create a situation in which the Board will take cognizance of the dispute without the consent of the employer and even though the employer should decline to appear. Then the Board, following its peculiar procedure and asserting its function of "adjusting" the dispute in disregard of the contract of the parties, may make an award allowing the claim and thereby in effect imposing a new contract on the employer, retroactively as well as prospectively, because it regards this result as desirable from the standpoint of some supposed economic "policy." After the Board has so acted, the employer will be prevented from having access to the courts unless the employe chooses to bring suit under Section 3 First (p), which in practice he never does and which he certainly would not do in cases where the award for reasons of alleged policy granted him more than his contract rights. Meanwhile, with this award outstanding against it, and with access to the courts closed in its face, the employer is subjected to the collective pressure and economic bargaining power of the labor organizations to put the award into effect. In this way awards, in the language of the respondents, "find their primary sanction in the collective economic bargaining power of the employees" (R. 103).

Respondents urge that this must be held to be the scheme of "adjustment" intended by Congress and required by the provisions of the Railway Labor Act. They say that the limitation of the employer's opportunity for judicial relief to a proceeding under Section 3 First (p), which rests in the option of the employes and which will

in fact never be brought, "forms an integral part of the Congressional plan" (R. 102), and that to permit the employer to seek judicial relief would "disrupt the process of judicial review contemplated by the statute" (R. 105). They rest this contention upon a "probable intent" on the part of Congress of "making resort to the Courts unattractive to the carriers" (R. 103-104), and amplify this by saying (Respondents' Brief in Supreme Court on original argument, p. 46):

> "* * * the purpose of the framers of the statute was to discourage, insofar as possible, non-compliance with the awards of the Board, and to give them a degree of practical finality which they would not otherwise possess."

The language just quoted can only mean that, if the employer is denied access to the courts otherwise than under Section 3 First (p), it will be placed in a position where to all intents and purposes it will have no choice but to comply with awards of the Adjustment Board, and this of course will give to those awards "a degree of practical finality which they would not otherwise possess." To attribute such an intent to Congress presupposes a Congressional intent to establish a scheme of compulsory adjustment which would effect a complete revolution from the plan embodied in previous Railway Labor Acts. The existence of such an intent on the part of Congress is not supported by anything in the language or legislative history of the present Act. On the contrary, it is at complete variance with the philosophy of that Act, as shown by its history and recognized by this Court in the *Moore* case. As already pointed out (above, p. 67), the House Committee in reporting the Act specifically stated that it did not "introduce any new principles into the existing Railway Labor Act" (House Report No. 1944, 73d Congress, 2d Session, p. 2). Thus the principles of the present Railway Labor Act must be taken to have been the same,

in the understanding of Congress, as the principles embodied in the pre-existing Act of 1926. That Act, like its predecessor, the Transportation Act of 1920, provided for a scheme of purely voluntary adjustment which in no way derogated from the jurisdiction of the courts (*Penna. R. R.* v. *Labor Board,* 261 U. S. 72 (1923), at p. 84). As this Court summarized the history and theory of the legislation, in the *Moore* case (pp. 635-36 of 312 U. S.):

> "* * * neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature."

To decide now that when an employe has taken a case to the Adjustment Board the employer's right to judicial relief thereafter lies exclusively through a proceeding under Section 3 First (p), which will never be brought, is very definitely to establish a system of compulsion. Respondents admit this themselves, and in fact urge it upon the Court as a ground for adopting their construction of the Act, when they say in the passage quoted above from their brief that the purpose of the Act, as they construe it, is to discourage "non-compliance with the awards of the Board, and to give them a degree of practical finality which they would not otherwise possess." If this is to be the construction and operation of the Act, it amounts to nothing less than the surreptitious establishment, without the knowledge of Congress, of a scheme of compulsory adjustment, novel and unprecedented in character. It would mean the establishment of a system which removes the legal and judicial obstacles that would otherwise stand in the way of the exercise of

coercion, in order to clear the way for the full operation of the "economic bargaining power" of the employes and to make that power effective in enforcing compliance with awards. This is in accord with respondents' theory that the true sanction of such awards is to be found in the collective power of the employes. The purpose of holding that Section 3 First (p) provides an exclusive judicial remedy for the employer is to subject it effectively to that power and close off the escape therefrom which would otherwise be afforded by an opportunity for recourse to a court of law.

Of course an effort is made to disguise the compulsory element in the scheme just described, under color of language which connotes purely voluntary settlement and compromise. It is said that the plan of Congress must be understood to have as "its cardinal principle that the parties should be given every inducement to agree upon a practical settlement of their differences" (R. 102-103), and the thought is unobtrusively suggested that the employer would be less inclined to settle if a way of relief through the courts were open to him. This has a voluntary sound, but it is obvious that the so-called "inducement" to settle which is offered to the employer is simply to corner it in a position where no choice is open to it but to yield to pressure. When respondents speak of inducements to voluntary adjustments, what they have in mind is to compel the employer to submit to a so-called adjustment against its will and then discourage its non-compliance with the resulting award by closing the courts against it while pressure is being applied. This is represented as a purely voluntary process, since it is claimed that the pressure is applied not by operation of law but merely by operation of fact. But it is too plain for argument that the use of the word "voluntary" in any such connection can only be in a Pickwickian sense.

Most of the puzzling anomalies which have been woven about the adjustment procedure of the Railway Labor Act

and which are coming to the surface in this case are due to an attempt to find some sleight-of-hand method whereby informal and voluntary processes, which are perfectly legitimate and unobjectionable so long as they remain voluntary, can be transmuted into involuntary and coercive processes. Respondents' whole argument about the policy of the Railway Labor Act comes down to the contention that, under the cover of words like "adjustment" and "inducement" which carry a voluntary flavor, the policy of the Act should be interpreted as in substance and effect a policy of coercion which would operate by putting the employer in a position where it has no choice but to comply with awards of the Adjustment Board even though they ignore the contract between the parties. If this is the sense in which the intent of Congress and the policy of the Railway Labor Act are properly to be construed, then this Court was wrong when it said in the *Moore* case that the machinery provided by that Act for settling disputes was not based on a philosophy of compulsion, and the House Committee was wrong when it said that the Act of 1934 did not introduce any new principles into the existing Railway Labor Act. What the respondents are asking this Court to do in the case at bar is to read into the Railway Labor Act a novel policy with the most far-reaching implications, which if adopted would strike at the very foundations of legal order, by transferring the settlement of controversies from the operation of law and adjudication to the use of pressure and coercion.

Respondents seek to evade these consequences of their position by asking this Court to close its eyes to facts and content itself with looking at forms. They admit for a brief and decisive moment the coercive quality of the construction for which they are contending when they urge that that construction is necessary in order to give awards a "degree of practical finality which they would not otherwise possess"; but they quickly put away this

realistic portrait and return with a picture-book of forms to which they claim that the court should limit its attention in determining whether "legal coercion" exists. Thus they say in their brief filed in this Court on the original argument (p. 55):

> "We conclude, therefore, that no legal compulsion can become effective against the petitioner as a result of an award of the Adjustment Board until after a full judicial hearing as provided by the Railway Labor Act; that the petitioner will have the opportunity to assert any and all defenses which it may have in such a hearing, and that accordingly, it is not deprived of any legal or constitutional right by being required to await the bringing of a statutory action instead of proceeding itself to seek review by declaratory judgment."

This means that, since Section 3 First (p) formally gives an employer an opportunity to defend itself against a suit under that section, when and if such a suit is brought, this opportunity must be regarded as adequate for the employer and as affording all the protection that it can properly claim, since "legal compulsion" cannot be applied to it save in such a suit. What petitioner is concerned with, however, is not the shadow and form of a "legal compulsion" which will never be applied and has never even been sought to be applied, but with the actuality of a very practical compulsion, the effectiveness of which the respondents themselves have insisted upon when they say that it gives to awards a degree of practical finality which they would not otherwise possess.

Of this actual and practical compulsion respondents say that this Court may take no notice and is not entitled to take notice, because such compulsion is something that is "extra-legal."* For the same reason, apparently,

*The fact that this practical compulsion is not "extra-legal" but is in reality a "legal compulsion," because made possible by virtue of the provisions of the Railway Labor Act, is shown below, at pp. 244-49.

the Court is also not to take notice of the fact that suits are never actually brought under Section 3 First (p), because that likewise is "extra-legal," although it is a fact reported and commented on in every published account of the Adjustment Board. Respondents seem clearly conscious that the success of the contentions which they are here defending depends upon keeping facts out of the case and making the case turn on a manipulation of legal patterns. Thus they say in their original brief in this Court (p. 53):

> "* * * petitioner asserts that it is under certain elements of extra-legal pressure which virtually compel it to comply with the awards of the Board without such a [judicial] hearing. It contends that this consideration should induce the court to rule in its favor."

And again (*ibid.*, p. 55):

> "Even, however, if the petitioner were able to establish that the situations of which it complains were truly burdensome and truly beyond its control, it would not thereby have advanced its case. The courts are not concerned with extra-legal reasons why a party may not desire to submit his rights to a special method of adjudication. If the road to the courts is open as a matter of law, the judiciary cannot be expected to clear it of all practical obstacles which may render travel difficult. The removal of such obstacles is a matter of legislative and not judicial consideration."

Translated into plain language and concrete terms, this can only mean that, if on the face of a statute there is an appearance of an opportunity for judicial protection, the courts may not look further because whether or not the opportunity actually exists and can be availed of is an "extra-legal" question. It means that, if a party

complains of a particular form of proceeding as insufficient because he does not have it in his power to bring that form of proceeding and those who have the power refuse to do so, this simply shows a lack of desire on his part, for extra-legal reasons, to submit his rights to that particular method of adjudication, and that such extra-legal reasons are not for the consideration of the courts. It means that, if judicial relief is available on paper but not in fact, the courts must not take this into account in determining whether to rule out by construction and implication, as this Court is asked to do here, another form of relief that would be available and effective, because it is said that to do so would be clearing "practical obstacles" out of the way and thus trenching on legislative prerogatives. The statement of these contentions may be permitted to stand as their sufficient refutation. The patently insincere formalism of such reasoning is not in accord with a properly serious and responsible approach to the determination of the issues here involved.

No less hollow is the purportedly practical argument advanced elsewhere by the respondents that the employer is shown not to need any right of access to the courts after an award, because the adjustment system is already working successfully and satisfactorily as shown by the absence of strikes in the railroad industry (Defendants' Memorandum Brief in District Court, p. 44; R. 110). The fact that there have been no strikes in the railroad industry in recent years is susceptible of more than one interpretation. It may indicate no more than that the threat to strike is so powerful a weapon that opposition yields before it. If this is so—as in fact it is—it serves to emphasize the danger of so construing the Railway Labor Act as to make awards find their "primary sanction in the collective economic power of the employes." This is only another way of saying that the Act should be so construed as to make strike threats the usual method for enforcing claims. If, as respondents contend, such a con-

struction of the Act should be adopted, it would obviously place the employer in a position where it would be under the continual coercion of such threats, and its rights under its contracts with its employes would be only what the employes would permit them to be. Clearly such a construction would place a premium upon the exertion of force and compulsion, and would disregard adjudication as an instrument of social order.

5. The Purpose and Intent of the Adjustment Provisions of the Railway Labor Act Can Be Fully Achieved Without Assuming That That Act Embodies a Coercive Process of Compulsory Adjustment, and Therefore the Act Ought not to be Given by Implication a Construction Which Would Produce an Oppressive and Arbitrary Result not Required by its Terms or by the Intent of Congress.

Respondents contend that, unless Adjustment Board awards are to be given the "practical finality" against the employer which comes from denying to the employer subsequent access to the courts, the adjustment procedure will become futile and without value, and it is said that an award would be an "absolute nullity" (R. 109) if the employer could immediately invoke the jurisdiction of the courts to retry the whole controversy. Respondents were successful in impressing this view on the majority of the Court of Appeals below, which said in its opinion (p. 242 of 124 F. (2d); R. 336):

> "If a carrier can * * * [circumvent] the employee's rights [to bring a suit under Section 3 First (p), and presumably to refrain from bringing such a suit] by judicial proceedings * * * the Railway Labor Act will have become, finally, a dead letter. The Board's awards would amount to nothing more than innocuous advice to the disputants, like that provided for under the Railway Labor Act of 1920, or mere

proposals for a new agreement, having not even the force of an offer in the law of contracts. If that is the result of the Act and of an award, Congress went to much ado about nothing. The chief effect of the legislation would be to create much complicated machinery, capable of producing only delay and confusion in settlement of disputes which it was the avowed object of the Act to end with expeditious decision. We do not believe that Congress intended any such consequences."

Whether the view thus expressed is sound, and whether or not it would be proper to say that an award would necessarily be futile and amount to nothing but "innocuous advice" if an employer could in the face of it apply to a court for a determination of its rights, depends wholly on the view which is taken of the nature of an award and of the function it is intended to perform under the scheme of the Railway Labor Act.

The view expressed by the majority below might conceivably be sound if an award were properly to be regarded as a compulsory order determinative of the parties' rights, although of course even such an order ought to be subject to substantial and not merely illusory review. Nevertheless, if the award is an order in the true sense, it might well be argued that any form of review which involves a complete trial *de novo* on the law and the facts operates to destroy the effectiveness of the order by reducing it to mere advice. That was the objection to the form of review originally provided for orders of the Interstate Commerce Commission, and a court might properly refuse to allow a proceeding which involved a review of that character *if adequate judicial relief of a different kind were available.*

The relevance of this discussion rests, however, as above pointed out, on the assumption that an Adjustment Board award is in fact an order carrying with it an obligation of obedience, with which obligation the courts

should not unnecessarily interfere. Is an award to be properly regarded as such an order under the true construction of the Railway Labor Act? Is it true under a proper construction of that Act that an award would be futile and amount to nothing even if it did merely constitute advice to the parties?

In the first place, it may be noted that if an Adjustment Board award is intended by the Railway Labor Act to be an order carrying an obligation of obedience, certain features of the adjustment scheme as established under that Act and certain provisions of the Act itself become difficult to understand. It is plain, for example, that the adjustment procedure as organized and administered, and as understood by those who are administering it, contemplates, not an adjudication of the rights of the parties under their contracts, but an adjustment of their relations, in the supposed interest of policy, which may involve a disregard of those rights. This is shown by the projection of the so-called conference method into the adjustment procedure—which is carried on in the first instance by a bi-partisan board created apparently for the express purpose that settlements may be arranged. It is further shown by the action of the referees, who adopt and promulgate in their awards settlements which do not necessarily conform to the terms of the contracts but may be based upon alleged principles of policy which, in respondents' language, will enable the parties in the future "to conduct the business of interstate commerce without friction, and without interruption" (R. 133).

Now if an award promulgated by this method and on these principles is to be regarded as an order carrying an obligation of obedience and which ought not to be fully examined by the courts because such re-examination would interfere with its effectiveness, then the highly unusual result would follow that a party to a contract would be placed in a position where the courts would step out of the way in order that he might have no recourse but to obey a determination based on supposed

policy in disregard and derogation of his contract rights. He would be placed in a position where he would have no choice but to be deprived of those rights as a result of the wholly non-judicial proceedings before the Board. Clearly, this was not the purpose or intent of Congress in enacting the Railway Labor Act.

Section 3 First (p) of the Act, even though not used in practice, nevertheless indicates plainly that Congress did not intend that the employer should be under an obligation to obey awards of the Board as such. This section, as already pointed out and as admitted by the respondents (pp. 27-30 above), does not contemplate an enforcement of the award as such, but provides instead that the suit is to be brought on the plaintiff's original contract claim, the award being merely evidentiary with respect to any findings of fact that it may contain. This is precisely what might be expected if the award was not regarded by Congress in the light of a mandatory order; and, on the other hand, it is impossible to reconcile with an intent that the award is to be obeyed as such. What the parties must obey is their duty under their contract, and accordingly provision for the enforcement of that duty, with the evidentiary aid of an award, is duly made in Section 3 First (p). Thus an award cannot properly be regarded as an order which the Act calls upon the parties to comply with against their will. In so far as it reproduces contract obligations, those obligations must of course be fulfilled, and as such they are enforceable, with the evidentiary aid of the award, in the statutory suit; but the award itself embodies no requirement of involuntary obedience.

From all that has been said above there finally emerges a consistent and intelligible picture of the nature and character of an award, of the purpose of the adjustment procedure, and of the place which awards are intended to occupy in the scheme of that procedure. They are not made enforceable and they carry no obligation of involun-

tary obedience, and accordingly they may embody settlements and solutions which may deviate from the parties' rights. Congress conceived that there might be advantage in providing a mechanism of mediation through which settlements could be formulated that might deviate from those rights, and which could formulate and propose such settlements under circumstances which might give rise to the hope that they would prove mutually acceptable. This is what it did in establishing a bi-partisan Adjustment Board and in so restricting the enforceability of the awards of that Board as to leave the Board free to formulate awards that might not exactly coincide with legal rights. Awards of the Board are given an essentially voluntary character, and they may, if it seems desirable, formulate settlements which could not fairly or justly be imposed on unwilling parties. If the adjustment procedure is conceived in this way, and only if it is conceived in this way, is it possible to reconcile the various adjustment provisions of the Railway Labor Act; and only if the adjustment procedure is conceived in this way does it conform to the description given by this Court in the *Moore* case, of "a system for peaceful adjustment and mediation voluntary in nature." Likewise, it is only if conceived in such a way that the adjustment procedure and the function of the Adjustment Board under the Railway Labor Act conform to the recent statement of Mr. Justice Jackson, speaking for this Court, in *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen, supra* (see pp. 43-44 above), that "The Mediation Board and Adjustment Board *act to compose differences* that threaten continuity of work" (Emphasis supplied). Neither of the descriptions in those cases would fit a conception of an Adjustment Board award as an order requiring involuntary obedience.

If the picture of the adjustment procedure just given represents correctly, as it appears to do, the plan and intent of the statute, what becomes of the objection which impressed the court below that a construction of the Act

would be inadmissible which deprived an award of the quality of command and reduced it to mere "innocuous advice"? The answer is that under the scheme of the Railway Labor Act an award has no quality of command and was not intended to have such quality since the system is one "for peaceful adjustment and mediation voluntary in nature." Accordingly it must be recognized as true that in a sense awards under the Act never are and never can be more than "advice," and the Act recognizes this by denying to them as awards the quality of enforceability. But this does not mean that it is proper to characterize them as "innocuous advice" or to say that an award is an "absolute nullity." These characterizations display a failure to understand the philosophy of mediation and adjustment which it was clearly the purpose and intent of the Railway Labor Act to embody. They assume that there is no middle ground between compulsion on the one hand and ineffectiveness or nullity on the other. This middle ground is precisely the field in which mediation and adjustment operate, and if no such ground exists the adjustment provisions of the Railway Labor Act are but a wilful deception.

The philosophy of mediation and adjustment proceeds on the assumption that, when parties become involved in a controversy respecting their rights, it is possible that a solution may be found which, without giving full effect to the rights of either, may prove acceptable to both. Frequently the parties themselves are not able to find such a solution by direct negotiation between themselves. In such cases experience has shown that if representatives of the parties can be brought together, they may develop the requisite ingenuity to devise a solution which they can persuade their principals to accept. Standing more or less apart from the controversy and often having a broader and more tolerant view of the issues, they can be expected to occupy a better position to formulate a variety of possible solutions than the disputants them-

selves. It is not, however, always possible for partisan representatives to accomplish the desired result. They may share the limitations of their principals and so be unable to devise a solution, or they may not carry enough weight or have enough influence with their principals to persuade the latter to accept the solution which they propose. Accordingly there has been developed, as a usual incident of the process of mediation and adjustment, a further stage which consists of calling in an outside neutral when the representatives of the parties have found themselves unable to accomplish results. Such a neutral mediator or referee, because of his outside position, is sometimes more successful than the parties' own representatives in obtaining an over-all view of the situation and in understanding the interests and needs of both sides. He can, therefore, devise a more satisfactory solution, while his disinterested position and the confidence which it inspires in both sides may lead them to accept more readily the solution which he proposes.

The system of mediation and adjustment thus outlined has become a well recognized mechanism in the field of labor relations generally, and it is obviously the system which has been adopted and incorporated in the Railway Labor Act. There is a detailed correspondence between the adjustment provisions of that Act and the system above described in each of its stages—first, the negotiations between the parties, then the attempted adjustment between the partisan representatives of the employers and the employes on the Adjustment Board, and, finally, the formulation of an award by the referee.

It is to be noted that the entire force and effect of the procedure of mediation and adjustment derives from, and is concentrated on, the attempt to bring about voluntary acceptance of the process and its results by the parties. Voluntary acceptance is the essence of the procedure and dictates its various stages and the means through which it operates. The initial negotiations be-

tween the parties, the conferences between their representatives, and the employment of a neutral referee would not be required and would have no significance or meaning save for the voluntary character of the procedure. It contains no element of compulsion or force, and the introduction of a compulsory element would be inconsistent with its methods and purpose, for two reasons. In the first place, it would render the whole cumbrous process of conference and mediation superfluous. In the second place, it would defeat the purpose and intent of the adjustment procedure, which is to bring the parties to a settlement that may involve their giving up existing rights which they have lawfully acquired, in exchange for prospective future advantages. Of course the parties can do this voluntarily if they are brought to see the advantages with sufficient clarity, but it is inconsistent with the nature and theory of the adjustment process, and with the fundamental principles of our system of law, that they should be compelled to do so involuntarily and submit to have new contracts made for them which they are unwilling to accept.

It is accordingly plain, as this Court recognized in the *Moore* case, that the system of adjustment established by the Railway Labor Act is essentially voluntary in character. This does not mean, however, that awards of the Adjustment Board and its referees can properly be characterized as mere nullities because they lack the quality of compulsory orders, or that their status and value are to be minimized by referring to them as nothing but "innocuous advice." The adjustment procedure, as above described, depends upon recognizing that there is an intermediate ground between compulsion on the one hand and mere advice on the other. The solutions formulated by the representatives of the parties or by the neutral referees, while not compulsory in the sense of requiring obedience, are supposed to have, and do in fact have, an influential character which operates through

psychological processes such as persuasion, confidence and respect rather than through compulsion. If this were not so, the procedure of mediation and adjustment would never have been developed. It would be a mere useless pretense and sham. At the same time, the introduction of a coercive element into the procedure immediately destroys its effectiveness. That effectiveness consists precisely in such things as confidence, respect, willingness to consider and accept proposed solutions, which are the things that lend authoritativeness to the mediator's suggestions, and which vanish at the breath of force.

Undoubtedly much of the sorry confusion, misunderstanding and controversy which has surrounded the National Railroad Adjustment Board, and has resulted in the present suit, is due to an effort to read a philosophy of compulsion into the adjustment provisions of the Railway Labor Act and to assume, as did the majority of the Court of Appeals below, that the awards of the Board, although they may involve deviations from the parties' contract rights, are nevertheless to be regarded as having a coercive effect going beyond that to which they are entitled under Section 3 First (p) of the Act. This view seems to rest in part, as shown by the passage quoted from the majority's opinion (pp. 156-57 above), on the fact that the adjustment procedure in the railroad industry has been established by statute. Doubtless a statute is generally thought of as involving an element of command, and the majority below seem to have assumed that Congress would not have legislated if it had not intended that a quality of command should adhere to Adjustment Board awards. No such consequence necessarily follows. A statute may establish a voluntary system of adjustment, no less than a compulsory system of command. The majority below, in the passage quoted, apparently thought that Congress could have had no other reason for enacting the Railway Labor Act of 1934 than to provide means for insuring obedience to awards. As a matter

of fact, the history of the Act shows that the reason was an altogether different one. It shows that what Congress was concerned with was not the question of making Adjustment Board awards compulsory, but was primarily the question of whether or not there should be an Adjustment Board whose services would be available to the employes of all the railroads of the country. The Act of 1926 left the establishment of Adjustment Boards to voluntary agreement, and as a result the Boards which were set up did not provide a complete coverage for all railroads. Also, the earlier Act contained no provision for the appointment of a referee when a Board deadlocked. It was to remedy these two situations that the Act of 1934 was passed, as explained in an earlier section of this brief (pp. 67-68 above). This was the reason for the legislation, with its establishment of what the majority below call "much complicated machinery." So far as relates to the compulsory character of awards, Congress expressed its intention with sufficient clarity by the insertion of Section 3 First (p) in the amended Act. As already pointed out, the unmistakable purpose and intent of that section was to recognize expressly that awards are not enforceable as such, and that the employer is under no obligation of obedience to an award. This is made abundantly clear by the provisions of the Act as discussed above (pp. 157-60). It is probably for this reason among others, as already suggested, that the employes have steadfastly declined to conform to the Congressional plan for enforcement, and it is their refusal to do so which is largely responsible for the condition of confusion and uncertainty with respect to awards which has culminated in the present litigation.

The position of the respondents in the case at bar rests upon a view of the adjustment procedure which combines two fundamentally inconsistent elements, the element of voluntary settlement and the element of compulsory

obedience. Necessarily they must accept the voluntary view in order to justify the action of the Board in proceeding non-judicially and making awards which disregard the contract rights of the parties. These aspects of the Board's activity can only be justified if its function is to stimulate, promote and facilitate voluntary settlements. Along with this voluntary conception of the adjustment procedure respondents wish, however, to combine a theory of compulsion. As noted above, they seek by sleight-of-hand to transmute informal and voluntary processes, which are perfectly legitimate and unobjectionable so long as they remain voluntary, into involuntary and coercive processes. They insist that the Act must be so interpreted as to provide a way whereby the employer can be "induced" to obey an adverse award, and that for this purpose the Act must be construed as denying it a right of access to the courts. Fundamentally, the only argument which the respondents have against petitioner's right to maintain this suit is that if it had such a right it would not be subject to sufficiently effective inducements to comply with awards of the Board. To produce compliance by "inducements" of this character is to compel compliance. A system of adjustment does not operate through voluntary methods when it places one of the parties in a position where for the purpose of "inducing" compliance he is deliberately exposed to pressure, while the opportunity of escape through judicial relief is denied to him. This is the scheme of adjustment procedure which the respondents are asking this Court to accept. Petitioner submits that that procedure was not intended by Congress to operate in this way and cannot lawfully be permitted to operate thus, at least so long as the Adjustment Board does not act judicially and does not confine itself to a proper judicial determination of the parties' contract rights.

6. If the Principles Advanced by Petitioner Herein Should be Thought to Require That an Employe Whose Claim Has Been Denied by the Adjustment Board Should be Allowed Recourse to the Courts for a Judicial Determination of His Legal Rights, Such a Result Does not Constitute a Refutation of Those Principles, But on the Contrary Leads to the Conclusion that Such an Employe Should be Permitted Such Recourse, and the Railway Labor Act Properly Construed Does not Prevent that Result.

All the reasons which have been advanced in this brief to show that an employer against whom an award has been rendered by the Adjustment Board should be entitled to have access to the courts are equally applicable to show that an employe against whom an award has been rendered is entitled to the same right. It would be improper to hold that an employe whose claim has been rejected by the Board may not pursue his legal rights judicially on the ground that the Act must be construed as precluding access to the courts in any form after a Board award except through a proceeding under Section 3 First (p), because, as demonstrated above, such a construction is not required by the Act, and is not permissible if the proper theory of the adjustment procedure is to be maintained. Accordingly, if there is no ground for holding that Section 3 First (p) provides the exclusive channel for judicial relief after an award of the Board, then such a construction of Section 3 First (p) cannot be invoked to support a holding that an employe whose claim has been rejected by the Board may not, if he so desires, proceed in court by an action for damages, bill for injunction or application for a declaratory judgment for a judicial determination with respect to his claim.

This view was in fact expressly adopted in *Stephenson* v. *N. O. & N. E. R. Co.*, 180 Miss. 147, 177 So. 509 (1937). In that case, a consolidation, for operating purposes, of the defendant railroad and another railroad, both of which had previously been operated as separate divisions of the

Southern Railway System, had been made, and a dispute arose with respect to the seniority of the train dispatchers involved in the consolidation. The dispute was taken to the National Railroad Adjustment Board, which made an award in favor of a consolidated seniority roster. Certain of the train dispatchers, who had been represented at the hearing before the Board and who claimed that their seniority rights were impaired by the Board's award, brought suit in the state courts to enjoin the defendant railroad from violating their seniority rights. The Supreme Court of Mississippi reversed the lower court's decree of dismissal and entered an injunction for the plaintiffs, resting its decision primarily on the ground that the dispute, though in form between the carrier and certain of its employes, was in substance and reality a dispute between two groups of employes and was therefore not the type of dispute of which the Adjustment Board was intended by Congress to take cognizance. However, the court then went on to say (pp. 177-79 of 180 Miss., 518-19 of 177 So.):

> "Answering the contention of the appellee carrier to the effect that it must obey the terms of the award of the Adjustment Board by pooling its seniority lists of train dispatchers with that of another separate and distinct railroad in violation of the property rights of its own employees, it should be observed that under the Railway Labor Act of 1934, the award of the Adjustment Board is not a self-executing order. * * * Neither the carrier nor the employee against whose interest an award has been made is given any right under the Act to go into the United States District Court as a party plaintiff or claimant. *Then, most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all of the courts of the land.* * * * *Hence, such an employee who has lost his cause before the Adjustment Board must necessarily*

*resort to a state court of competent jurisdiction, or lose the property rights involved in a seniority contract with his employer.''* (Emphasis supplied.)

Thus, the court expressly states that, in a case where an employe has lost his claim before the Adjustment Board, although such employe is without standing to sue in the Federal courts in the absence of some recognized ground of Federal jurisdiction, since the Railway Labor Act confers no general jurisdiction on the Federal courts with respect to labor disputes but only jurisdiction to entertain a suit under Section 3 First (p), nevertheless such employe still has available the usual remedies in the state courts, as courts of general jurisdiction, to protect his contract and other legal rights, and the fact that his claim has been rejected by the Adjustment Board does not bar his resort to the general jurisdiction of the state courts to invoke those remedies.*

*To like effect are the decisions in *Lane* v. *Union Terminal Co.*, 12 F. Supp. 204 (N. D. Tex., 1935) and *McDermott* v. *N. Y. Cent. R. Co.*, 32 F. Supp. 873 (S. D. N. Y., 1940). In the *Lane* case, an employe whose displacement from his position as gateman had been directed by the Adjustment Board had sought and obtained in the state court an injunction restraining the Terminal Company from displacing him in compliance with the award of the Board. Thereafter, the injunction in the state court was apparently modified to permit the issues to be considered in a Federal court, in the light of the Railway Labor Act, and a bill in equity was accordingly brought, seeking the same relief as was sought in the state court. The Federal District Court, however, decided that, in view of the provisions of Section 3 First (p) of the Railway Labor Act to the effect that suit under that section may be brought by the "petitioner, or any person for whose benefit such order was made," the jurisdiction of the Federal courts under that Act did not extend to suits brought by persons whose claims had been denied by the Adjustment Board, and, since there was no other ground of Federal jurisdiction in the case, the plaintiff was left to his remedy in the state courts.

Likewise, in the *McDermott* case, the Federal District Court, holding that it was without jurisdiction where the plaintiff's claim had been rejected by the Adjustment Board, said (p. 874 of 32 F. Supp.):

> "The plaintiff is not without remedy for breach of contract but he cannot maintain his action in this court."

In other words, the sense of these cases is that, although a claimant employe who has lost before the Adjustment Board cannot thereafter seek relief in a Section 3 First (p) proceeding, which is provided only for the benefit of claimants whose claims are sustained by the Board, nevertheless such a defeated claimant is not barred from the remedies which he would have in a court of general jurisdiction and which were available to him before he went to the Board.

Of course, another reason might be advanced for holding that an employe who had voluntarily submitted his claim to the Adjustment Board and had been rejected by it was thereafter barred from submitting the same claim to the courts. It might be contended that in such a case the employe, having voluntarily elected to pursue the administrative remedy and seek relief before the Adjustment Board, was thereafter precluded, on principles of estoppel under the so-called doctrine of election of remedies, from changing to another type of remedy. This has in fact been suggested in some cases as a reason for dismissing a suit brought by the employe under such circumstances (see discussion at pp. 223-27 below). Petitioner believes that such reasoning is unsound and that the mere fact of the employe having elected to pursue the administrative remedy does not constitute a true basis for the application of the principle of estoppel.* The sounder view, petitioner submits, is that reflected in the opinion in the *Stephenson* case, *supra*.

* The so-called doctrine of election of remedies has its foundation in principles of estoppel, and should therefore be applied only where there is a voluntary choice or election of one of several inconsistent remedies, under circumstances in which a subsequent change from the voluntarily elected remedy to another remedy would infringe upon rights which arose as the result of the choice of the prior remedy. See, for example, *United States* v. *Oregon Lumber Co.*, 260 U. S. 290, 43 S. Ct. 100 (1922), where this Court said (p. 295 of 260 U. S.):

> "Any decisive action by a party, with knowledge of his rights and of the facts, determines his *election* in the case of *inconsistent remedies*, and one of the most unequivocal of such determinative acts is the bringing of a suit based upon one or the other of these *inconsistent conclusions*." (Emphasis supplied.)

This doctrine has no application where, as in the present case, there is no such choice of one remedy giving rise to rights which would be infringed by a subsequent change to another and inconsistent remedy. This was pointed out in *McFadden Securities Co.* v. *Stoneleigh Garage*, 55 F. (2d) 1025 (App. D. C., 1932). There a suit upon a lien on cars which the plaintiff had sold to the defendant was held by the District Court to be barred because the plaintiff had previously intervened in an equity receivership proceeding to secure payment for the cars out of funds in the hands of the receiver. The ground of the holding was that the intervention in the receivership proceeding constituted an election of remedies which barred the plaintiff from pro-

However, even if it were tenable to hold that an employe whose claim had been voluntarily submitted to and rejected by the Adjustment Board was therefore estopped by his own act to change to another type of remedy, such a holding would have no bearing upon the present case. Here, for the reasons set forth in Section II of this brief (pp. 82-92 above), petitioner had no choice but to appear before the Adjustment Board and defend itself as best it could against the unilateral submission by the employes of the dispute to the Board, and accordingly in no sense was there any voluntary choice or election by petitioner of the adjustment procedure as the preferred remedy. The doctrine of estoppel or of election of remedies necessarily presupposes a voluntary choice or election,* and it can

---

ceeding directly against the goods sold. The Court of Appeals reversed the District Court's action, saying:

> *"The doctrine of election, where it applies at all, applies only to a case where one assumes an inconsistent position,* or where, through his action, other rights have arisen *as to which he should be estopped to take a contrary position.* It is never applicable where, as here, a creditor has a right to pursue more than one remedy." (Emphasis supplied.)

To the same effect is *United States* v. *Ickes*, 73 F. (2d) 844 (App. D. C., 1934).

In the present case there is no inconsistency between the remedies in question and no prejudice to the rights of the other party, on which an estoppel can be founded, is created with respect to either party as a result of the other party's resorting to the courts following submission of the dispute to the Adjustment Board. See discussion at p. 191 below.

In fact, the doctrine of election of remedies is one which today has very limited and infrequent application, and modern courts appear to be viewing the doctrine with an increasing amount of suspicion and to be severely restricting its scope and application. See, for example, *Friederichsen* v. *Renard*, 247 U. S. 207, 211, 213, 38 S. Ct. 450 (1918); *Oil Well Supply Co.* v. *First Nat. Bank of Winfield, Kan.*, 106 F. (2d) 399 (C. C. A. 10th, 1939).

* Thus, this Court said in *Wm. W. Bierce, L'd*, v. *Hutchins*, 205 U. S. 340, 27 S. Ct. 524 (1907) (p. 346 of 205 U. S.):

> "Election is simply what its name imports. A *choice* shown by an overt act, between two *inconsistent* rights, either of which may be *asserted at the will of the chooser alone.*" (Emphasis supplied.)

Likewise, in *Pittsburgh Terminal Coal Corporation* v. *Bennett*, 73 F. (2d) 387 (C. C. A. 3rd, 1934), it was said (p. 389):

> "Election involves a *choice*, and choice presupposes a knowledge of alternatives *and freedom and opportunity to choose between them.*" (Emphasis supplied.)

have no application where there has been no such choice or election.

Accordingly, even if an employe who had voluntarily submitted his claim to the Adjustment Board and had been rejected by that Board should be held barred from thereafter submitting the same claim to the courts, on the ground that he was bound by his election of the adjustment procedure as his preferred remedy, nevertheless that ground would have no application to bar petitioner in the present case, because there has been no choice or election by petitioner of the adjustment procedure as its preferred remedy.*

**D. Preservation of the Advantages Given to the Employes in Suits Brought Under Section 3 First (p) of the Act Does Not Require that the Act Should Be Construed So As to Produce the Arbitrary and Oppressive Results Which Would Follow from Denying the Employer Access to the Courts On Its Own Initiative After an Award of the Board.**

It has been shown above that there is no basis for inferring any "policy" in the Railway Labor Act which would require that after a controversy has been submitted to the Adjustment Board the employer shall thereafter be denied access to the courts save in a proceeding brought by the employe under Section 3 First (p). There remains to be considered the contention of respondents that the judicial remedy through Section 3 First (p) must be held to be exclusive for another reason, namely, to preserve to the employes certain procedural advantages which they are permitted to enjoy in a suit brought under that section of the statute.

The terms of Section 3 First (p) are sufficient proof of an intent on the part of Congress to offer to employes an advantageous and attractive form of procedure with

* For further discussion of this point, see below at pp. 188-91 and 227.

respect to matters of venue, costs and attorney's fees. If this had not been the Congressional intent, obviously no such form of statutory suit with these features would have been provided. To be sure, the benefit thus intended to be conferred on the employes appears to be quite unappreciated, since, in accordance with the settled policies of their labor organizations, they never avail themselves of the advantages held out to them under the section. However, the Congressional intent seems plain, and the question therefore arises as to what inference, if any, is to be drawn therefrom with respect to whether or not Section 3 First (p) must be construed as providing the exclusive judicial remedy available to the employer after an award of the Adjustment Board.

On ordinary principles of reasoning it would not seem to follow that, because an unusually attractive remedy has been offered to one of the parties to a controversy, the other party must for that reason be presumed to have been deprived of any right to proceed at all. On the contrary, the proper conclusion would seem to be that the reason for making a particular form of procedure attractive to one party is to encourage that party to take the initiative—an encouragement which would not be necessary if the other party had no power whatever to proceed. If the employer could not proceed at all, it would seem futile and superfluous to influence the employe to proceed by holding out special advantages.

As a matter of fact, the explanation for the enactment of Section 3 First (p) is almost certainly an even simpler one. As has been pointed out above, a suit brought under Section 3 First (p) is brought not on the award of the Adjustment Board but on the original contract between the parties. Now before the enactment of Section 3 First (p) there was no jurisdiction in the Federal courts to entertain a suit based on simple contract rights in the absence of diversity of citizenship between the parties. Accordingly, the suit had to be brought in a state court.

Obviously, the principal purpose of Section 3 First (p) was to cure this defect and enable such suits to be maintained in the Federal jurisdiction, with the evidentiary aid of the Board's award. This was pointed out by the Circuit Court of Appeals for the Seventh Circuit in *Nord* v. *Griffin, supra,* where the court said (p. 484 of 86 F. (2d)):

> "The clear intent was not to limit the previously existing jurisdiction of the court, but rather to extend that jurisdiction to cases to which it had not previously applied."

The only possible ground for treating the advantages offered to the employe in a proceeding under Section 3 First (p) as an indication of Congressional intent that no other suit should be permitted would be a showing that if such other suit would lie it would necessarily deprive the employe of those advantages. This argument, of course, assumes that Congress intended the employe to enjoy the advantages absolutely, whereas the most that can be inferred from the statute is that Congress intended him to enjoy them only in the contingency that he actually exercised his choice to sue under Section 3 First (p). If he does not elect to do so, it is not necessary to suppose that Congress intended to protect him with respect to advantages which he does not value highly enough to warrant his availing himself of them. This seems a sufficient answer to the whole argument.

However, it is clear in any event that there must be at least a showing that such a suit as petitioner is here seeking to maintain would impair the advantages which the employes would enjoy under Section 3 First (p) before it can be contended, rightly or wrongly, that the employer must necessarily be denied the right to bring such a suit in order to protect the employes in the enjoyment of their advantages under Section 3 First (p). Respondents' argument neglects the need for such a showing. It pro-

ceeds on the bare assumption that, unless a proceeding under Section 3 First (p) is held to afford the exclusive opportunity for access to the courts after an Adjustment Board award, the employes will necessarily be completely deprived of the advantages that Congress intended them to have under that section.

To this view respondents were successful in bringing a majority of the Court of Appeals below, which said in its opinion (p. 240 of 124 F. (2d); R. 334):

> "Congress intended these advantages to mean something. They mean nothing if such a suit as this can be maintained."

And again (p. 241 of 124 F. (2d); R. 335):

> "All these advantages the statute makes incident to the enforcement suit. They cannot be had in any other. We have no power to grant them in this one. Yet the argument that it can be maintained brushes them aside, as if they were mere matters of procedure, not affecting the substance of decision or right. With that we cannot agree."

This language of the court below assumes that the mere institution of a suit like the present one, if it should be held that such a suit can be maintained, would operate to bar the employes from bringing suit under Section 3 First (p) and thereby obtaining such advantages as are made available to them in a suit of that character. However, it is clear that such a suit could still be instituted on behalf of the employes and prosecuted to judgment if they so elected, notwithstanding the prior institution of a declaratory judgment suit like this one, and therefore the maintenance of the present suit would in no way operate to deprive the employes of the benefits sought to be conferred on them by Section 3 First (p).

There are only two ways in which the prior institution of a declaratory judgment proceeding could conceivably interfere with a subsequent suit by the employes under Section 3 First (p), but in neither of these ways would the declaratory judgment proceeding have such an effect:

1. The existence of the previously instituted declaratory judgment suit might conceivably be regarded as constituting a bar to the second suit so as to cause the court having jurisdiction of the second suit to abate that suit pending final determination of the prior suit; but the decided cases have held otherwise.

2. The court having jurisdiction of the first suit might proceed in such a manner—*e. g.*, by enjoining the parties from prosecuting the second suit or by pressing its own suit to judgment—as to nullify the practical effectiveness of the second suit; but, again, this possibility is eliminated under established principles.

Under the decided cases it is clear that a suit begun by an employe or employes under the provisions of Section 3 First (p) of the Railway Labor Act to make effective rights declared in an award of the Adjustment Board, after the institution by the carrier of a proceeding for a declaratory judgment, as in the present case, would in no way be barred or interfered with by the institution of the prior declaratory judgment suit.

1. A Proceeding Such as the Present One Would Not Bar a Suit Subsequently Brought by the Employes Under the Provisions of Section 3 First (p) of the Railway Labor Act.

It is well established by the cases that the fact that one court has assumed jurisdiction of a particular cause of action does not preclude another court—and *a fortiori* does not preclude the same court—from entertaining a

suit involving the same subject matter, except in the case of actions *in rem* or *quasi in rem*. This rule is set forth and is discussed at length in the decision of this Court in *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 43 S. Ct. 79 (1922). In that case the construction company brought an action for breach of contract in a Federal court, the ground of jurisdiction being diversity of citizenship. Thereafter the defendants in that action instituted a suit in equity against the construction company in a State court, seeking an accounting and judgment under the contract. The construction company then sought in the Federal court to enjoin further prosecution of the equity suit subsequently brought in the State court. The Supreme Court, in holding that such an injunction was properly refused by the District Court, pointed out that the injunction would have been proper to preserve the jurisdiction of the prior court over the *res* of the suit if there had been such a *res*, and then went on to say (p. 230 of 260 U. S.):

> "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. * * * *The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded.*" (Emphasis supplied.)

This principle has been directly applied to a situation closely analogous to the present one, in *New York Life Ins. Co.* v. *Roe*, 102 F. (2d) 28 (C. C. A. 8th, 1939).

There an insurance company instituted proceedings in a Federal court for a declaratory judgment of its rights and liabilities under certain insurance policies. In its petition the company included a request that the defendants, beneficiaries under the policies, be enjoined from prosecuting in any other court an action on any of the policies in question during the pendency of the declaratory judgment proceeding. On appeal from a decree dismissing the bill, the Circuit Court of Appeals held, first, relying on *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 46 (1937),* that the case was a proper one for the exercise of declaratory judgment jurisdiction, and second, relying on *Kline* v. *Burke Constr. Co., supra*, that the insurance company had no right to an injunction against the prosecution of suits by the beneficiaries in other courts. The court said (pp. 31-32 of 102 F. (2d)):

> "Where one court takes jurisdiction of an action *in personam* seeking a judgment for money only, it does not affect the right or the duty of another court to try and adjudicate the same cause of action. *Kline* v. *Burke Construction Company*, 260 U. S. 226, 43 S. Ct. 79, 67 L. Ed. 226, 24 A. L. R. 1077. The fact that the declaratory judgment law has given the alleged debtor the right to initiate the action to adjudicate the dispute over the contract for the payment of money only, does not call for the application of any different rule. *The beneficiaries under these policies may maintain actions at law on the policies for recovery of money only, notwithstanding the pendency of the company's suit to have it declared that the*

* In the *Aetna* case this Court held that the advantages which accompany the right of a beneficiary under an insurance policy to bring suit against the insurer in order to enforce the policy do not defeat the right of the insurer to institute a proceeding for a declaratory judgment to determine an existing controversy with respect to the policy, in the absence of an actual suit by the beneficiary on the policy.

*company is not indebted on account of the same* policies." (Emphasis supplied.)*

In the same manner, the respondents in the present case may institute on their own initiative and maintain actions under Section 3 First (p) of the Railway Labor Act, notwithstanding the pendency of a previously instituted suit, like the present one, to have the rights of the parties declared with respect to the same issues.

Clearly, therefore, a suit brought by the employes under Section 3 First (p) of the Railway Labor Act would not be barred by the existence of a prior suit for declaratory judgment, instituted by the carrier in another court, and the employes are accordingly free to begin such suit on their own initiative, for the purpose of securing whatever

---

*This rule has been followed in many cases, among which the more recent ones, involving circumstances of the same character as those in the *Roe* case, are: *Aetna Casualty & Surety Co.* v. *Yeatts*, 99 F. (2d) 665 (C. C. A. 4th, 1938); *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 F. (2d) 514 (C. C. A. 3d, 1938); *Central Surety & Ins. Corporation* v. *Norris*, 103 F. (2d) 116 (C. C. A. 5th, 1939); *Ballard* v. *Mutual Life Ins. Co. of New York*, 109 F. (2d) 388 (C. C. A. 5th, 1940).

Of course these cases are to be sharply distinguished from the group of cases in which subsequent suits between the same defendants and the same plaintiffs involving the same issues have been enjoined in order to prevent harassment from multiplicity of suits. But even this *quia timet* jurisdiction of the courts of equity will not be exercised "unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation": *Boise Artesian Water Co.* v. *Boise City*, 213 U. S. 276, 29 S. Ct. 426 (1909). To like effect are *Matthews* v. *Rodgers*, 284 U. S. 521, 52 S. Ct. 217 (1932), and *Moor* v. *Texas & N. O. R. Co.*, 75 F. (2d) 386 (C. C. A. 5th, 1935).

Another group of cases which must be distinguished from the present case consists of those involving suits for infringement of patent rights, as for example, *Milwaukee Gas Specialty Co.* v. *Mercoid Corporation*, 104 F. (2d) 589 (C. C. A. 7th, 1939). A patent is in the nature of a *res*, in the sense that a suit for its infringement does not involve simply a personal liability but is concerned with issues as to the ownership of a particular device or thing. Accordingly, suits involving patent infringements generally fall within the exception to the general rule noted in *Kline* v. *Burke Constr. Co.*, *supra*, whereby in the case of an action *in rem* or *quasi in rem* the exercise by a second court of jurisdiction over a *res* to which the jurisdiction of another court has previously attached would impair or defeat the jurisdiction of the first court.

advantages may accrue to them therefrom. *A fortiori*, a Section 3 First (p) proceeding brought by the employes in the same court would not be barred, since there could in any event be no question of interference with or impairment of the court's jurisdiction in such a case.

Could the carrier, as party plaintiff in the prior suit, successfully apply to the court having jurisdiction of the second suit—whether the same or a different court—for a discretionary stay of the proceedings in the latter suit, on the ground of priority of the jurisdiction of the court in which the earlier suit was filed? The answer to this must of course be "no," for two reasons. In the first place, the cases and principles already reviewed show that no priority of jurisdiction is obtained by the suit which is filed first, where both actions are *in personam* and where there is no element of harassment. In the second place, the granting of a stay of proceedings already pending is a matter for the sound discretion of the court. Thus, in *Landis* v. *North American Co.*, 299 U. S. 248, 57 S. Ct. 163 (1936), this Court, speaking through Mr. Justice Cardozo, said (pp. 254-55 of 299 U. S.):

> "• • • the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.*" (Emphasis supplied.)

If it is shown to the court having jurisdiction of the second suit, initiated by the employes under Section 3 First (p) of the Railway Labor Act, that Congress intended the employes to have certain advantages in the latter suit which they did not have in the declaratory judgment suit, it is wholly unlikely that the court in which the employe-initiated suit under Section 3 First (p) was

pending would stay proceedings in that suit merely because of the fact that the declaratory judgment suit was filed first. To grant such a stay would, under those circumstances, clearly constitute an abuse of the court's discretion.

But, even though the employes' subsequent suit is not barred by the prior institution of the declaratory judgment suit and could not be stayed on account of the prior suit, is it not possible that the prior suit would proceed to judgment before the conclusion of the second suit, so that the employes in the second suit might then be confronted with the judgment in the prior suit as the basis for a plea of *res adjudicata?* To this the answer must be that, if the procedure provided by Section 3 First (p) of the Railway Labor Act and invoked by the employes in the second suit was intended by Congress to secure to the employes advantages which they cannot obtain in the first suit, as respondents and the majority below assume, then the court having jurisdiction of the first suit would necessarily be bound in the exercise of sound discretion to stay further proceedings in that suit and thereby permit the second suit to proceed first to judgment.

2. Assuming That Congress Intended the Advantages of the Procedure Under Section 3 First (p) of the Railway Labor Act to be Preserved to the Employes, the Court Having Jurisdiction of the Declaratory Judgment Suit Would, in the Exercise of Its Discretion, Grant a Stay of That Proceeding Upon the Commencement of a Suit by the Employes Under Section 3 First (p); and to Do Otherwise Would Clearly be an Abuse of Discretion by the Court.

As pointed out in *Landis* v. *North American Co., supra,* the granting of a stay of proceedings is within the sound discretion of the court having jurisdiction of the proceedings. Moreover, the facts as well as the reasoning in that case would afford ample authority to a court

having jurisdiction of a previously instituted declaratory judgment suit for granting a stay of proceedings in that suit, upon application of the employes as plaintiffs in a suit filed in the same or another court under the provisions of Section 3 First (p) of the Railway Labor Act. In the *Landis* case, certain public utilities had filed suits in the District of Columbia against the members of the Securities and Exchange Commission to enjoin enforcement of the Public Utility Holding Company Act of 1935 on the ground of its unconstitutionality. At about the same time, the Securities and Exchange Commission filed a complaint in a Federal District Court in New York to compel certain other public utilities to comply with the Holding Company Act. Shortly thereafter a motion for stay of proceedings was filed on behalf of the members of the Commission in the District of Columbia suits, on the ground that to proceed with the trial of the District of Columbia suits simultaneously with the New York suit, when substantially the same issues were involved in both cases, would impede the orderly and economical disposition of the controversy. The motion to stay proceedings in the District of Columbia was opposed on the ground that the parties were not the same as in the New York suit, but the motion was nonetheless granted by the District of Columbia Court. This was reversed by the Court of Appeals, but *certiorari* was granted by this Court, which reversed the Court of Appeals. In addition to the passage quoted above (page 180), Mr. Justice Cardozo said (pp. 254-56 of 299 U. S.):

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical. • • • True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward,

if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. *Considerations such as these, however, are counsels of moderation rather than limitations upon power.* • • • *We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions. Especially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.*" (Emphasis supplied.)

Thus, despite the fact that the parties were not the same in both the District of Columbia and the New York suits, although the issues were substantially alike, this Court remanded the proceedings to the District of Columbia Court for the exercise of its discretion in the light of all the circumstances and of this Court's opinion. In the District Court's reconsideration of the motion for stay, "Benefit and hardship will be set off, the one against the other, and upon an ascertainment of the balance discretionary judgment will be exercised anew" (p. 259 of 299 U. S.).

To like effect is the opinion of this Court in *Amer. Life Ins. Co.* v. *Stewart,* 300 U. S. 203, 57 S. Ct. 377 (1937). In that case an insurance company began an equitable action to cancel certain policies on the ground of fraud. Subsequently, the beneficiaries sued on the policies at law in the same court. After motions for dismissal were filed by the defendants in the equity action and were denied by the trial court, the parties in that action stipulated that the equity suit should continue and should be tried before the action at law was tried. In

view of the stipulation, there could of course be no question as to the grant of a stay of proceedings. However, in reversing the holding of the Circuit Court of Appeals to the effect that the insurer had an adequate remedy at law and therefore its equitable action was improperly brought, this Court, again speaking through Mr. Justice Cardozo, used language which is particularly apt for the present case (pp. 212-16 of 300 U. S.):

> "No doubt it is the rule, and one recently applied in decisions of this court, that fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available. • • • That being so, an insurer, though the victim of a fraud, may commonly stand aside and await the hour of attack. *But this attitude of aloofness may at times be fraught with peril.* • • • *Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation.* • • • *There is indeed, a possibility that the bringing of actions at law might have been used by respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. Landis* v. *N. American Co., 299 U. S. 248. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another especially where the parties and the issues are the same. Ibid. If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity.*" (Emphasis supplied.)

Thus, Mr. Justice Cardozo suggests quite plainly in that case that it would have been entirely proper, and in fact desirable, for the District Court, upon application by the respondents in that case, to grant a stay of the prior equitable suit in order to permit the subsequently instituted action at law brought by the respondents on the policies to proceed to a conclusion.

Likewise, in the present case it is clear, in the light of the above decisions, that if, following the institution by the carrier of a declaratory judgment proceeding of the kind here involved, the employes should begin suit under Section 3 First (p) of the Railway Labor Act, and should then apply to the court for a stay of the declaratory judgment proceeding, it would be entirely within the discretion of the court to grant such a stay, since not only the issues but the parties as well would be the same. And if the employes could show to the court having jurisdiction of the declaratory judgment proceeding that Congress in enacting the Railway Labor Act intended them to have advantages which they could obtain only in their subsequent suit under Section 3 First (p), so that the intent of Congress as manifested in that Act would be better fulfilled by staying the declaratory judgment proceeding while the suit under Section 3 First (p) proceeded to judgment, it is certain that it would be an abuse of discretion on the part of the court to refuse such a stay. This is of course true whether the declaratory judgment suit and the Section 3 First (p) proceeding are in the same court or in different courts, since in both situations it would be an abuse of discretion on the part of the court having jurisdiction of the declaratory judgment suit to refuse to stay it in favor of another proceeding pending between the same parties and involving the same issues, when it was shown that the latter proceeding would enable the court to carry out more fully the manifest intent of Congress.

This argument was claimed by respondents, in their brief on the original argument in this court, to be unsatis-

factory, for the reason that the action of courts in exercising their judicial discretion is unpredictable and undependable, according to respondents. But this reasoning of respondents is too rigid and at the same time reflects the same lack of confidence in the wisdom and discretion of courts generally that underlies the unwillingness of the labor organizations to take their disputes with employers into court. Respondents are not satisfied with the type of relief on which most litigants must depend, namely, relief by decision within the field of a court's judgment and discretion. On the contrary, respondents want a remedy which is absolutely mechanical and in which they can be assured in advance, by elimination of the factor of human judgment, of a decision in their favor. Respondents forget that appellate courts are created to correct mistakes of judgment and abuses of discretion made by trial courts and lower appellate courts, and that, if the appellate courts of last resort are likewise occasionally chargeable with errors of judgment, such errors of judgment proceed from the same frailties of human nature to which all litigants are and will continue to be exposed so long as courts are composed of human beings.

Clearly, it would be reversible error for a court to refuse to stay a declaratory judgment suit, when shown that another proceeding involving the same parties and the same issues, brought under Section 3 First (p) and actually pending, would be more appropriate to fulfill the intent of Congress, just as much as it would be reversible error for a court to construe and apply statutory language in a manner contrary to the intent of Congress as plainly expressed in other parts of the statute and in its legislative history.

In any event, the question would not arise in the present case, because counsel for petitioner in this case expressly stated to the District Court (R. 300) that petitioner would raise no objection to permitting a suit by the employes under Section 3 First (p) of the Railway Labor Act, if

such a suit were brought, to proceed in preference to the declaratory judgment suit.

The purpose of petitioner in instituting the present declaratory judgment suit is not to deprive the employes of advantages in litigation which they would have and which Congress intended them to have in a proceeding under Section 3 First (p) of the Railway Labor Act. Petitioner is concerned, not that it shall have judicial relief in any particular form, but that it may have an opportunity for judicial determination, in *some* form, of its rights and liabilities under the contract with its employes, and that it shall not be forced to comply with the Board's award without judicial consideration of the question whether that award represents a correct interpretation of petitioner's obligations under the contract. It has chosen this method of proceeding because it appears to be the only course open to it whereby it may have some hope of obtaining the judicial consideration which would otherwise, under the circumstances of the case, be barred to it. As stated by Mr. Justice Cardozo in *Amer. Life Ins. Co.* v. *Stewart, supra,* an "attitude of aloofness may at times be fraught with peril," so that a party against whom a claim is threatened but not actually pressed to judicial decision may "be condemned to loss through the mere inaction of an adversary." That is exactly the situation of petitioner in the case at bar. What it seeks to accomplish by the present action is not the denial to respondents of advantages otherwise available to them, or the frustration of Congressional intent, but merely the protection of its fundamental right to a judicial determination of its obligations and liabilities with respect to a controversy under its contract with its employes.

Clearly, therefore, the majority of the Court of Appeals below erred in assuming that it was necessary to construe the Railway Labor Act so as to exclude a declaratory judgment proceeding like the present one, in order to

preserve to the employes such advantages as Congress intended them to have in a suit under Section 3 First (p). Those advantages were still available to the employes after the present suit was brought, and could be readily obtained by them by the institution of a suit under Section 3 First (p), in the manner indicated above.

*The fact is that what the employes really want to protect is not the preservation of advantages available to them in Section 3 First (p) proceedings but their privilege of not instituting a Section 3 First (p) proceeding at all, and the opportunity which that privilege, coupled with the employer's lack of opportunity to obtain judicial relief, gives them to obtain compliance with awards of the Board through the exertion of economic pressure.* If the objective of the employes were really to secure for themselves the advantages which they now appear so anxious to preserve, they would long ago have manifested their interest in those advantages by bringing Section 3 First (p) proceedings in order to obtain them. The fact that the employes have steadfastly refused to bring such suits shows that their real aim is to preserve their privilege of exercising their full economic power to compel compliance, by barring the employer from access to its only means of obtaining relief, namely, the courts.

**E. The Fact That Petitioner Appeared and Defended Itself Before the Adjustment Board Does Not Amount to a Voluntary Choice or Election By It of the Adjustment Procedure So as to Bar it Thereafter From Asserting Its Right to Judicial Relief Subsequently to the Issuance of the Award.**

Even if it is assumed that the *Moore* case was correctly decided and that the system of adjustment provided in the Railway Labor Act is essentially voluntary in nature, nevertheless it might still be contended that, where the employer appears and defends itself before the Adjust-

ment Board, the employer thereby consents to the use of the Adjustment Board procedure and is thereafter barred from asserting its right to judicial relief subsequently to the issuance of an award by the Board. This was in fact the ground on which the majority below attempted to distinguish the *Moore* case, so as to reach the conclusion which it did without coming into conflict with that case (see pp. 244, 249 of 124 F. (2d); R. 338, 345).

But this position of the majority below rests on the assumption that the employer in appearing and defending itself before the Board in response to a unilateral submission by the employes manifests a voluntary choice or election of the adjustment procedure as the method by which the employer is willing to have the dispute determined. This assumption is obviously false, for the reason that, as pointed out in Section II above (pp. 82-92), the employer in fact has no choice in the matter but is obliged to appear and defend itself as best it can against a unilateral submission by the employes, or run the risk of having an award entered by default against it. A "choice" or "election" clearly contemplates the existence of two or more alternatives and the voluntary exercise of a preference for one of those alternatives as against the other alternative or alternatives.* Here the employer has no such opportunity voluntarily to select its preference of two or more alternatives. There is as a practical matter only one course open to it, namely, to appear before the Board and make the best defense possible.

To hold, in the face of these facts, that the employer's appearance before the Board in response to a unilateral submission of a dispute by the employes constitutes a choice or election by the employer of the adjustment method so as to bar it thereafter from asserting its right to judicial relief would amount to resting the decision on two false premises. In the first place, it would amount to ignoring altogether the fact that the adjustment provisions of the Act, as thus construed, would operate in a compulsory way upon the employer, contrary to the deci-

* See cases cited in footnote on p. 171 above.

sion of this Court in the *Moore* case (see pp. 62-64 above). In view of the compulsory operation which those adjustment provisions as a matter of fact have, if the employer is denied access to the courts after the issuance of an award by the Board, it cannot consistently be said that there is in any proper sense an element of voluntary exercise of preference on the employer's part in appearing and defending itself in response to a unilateral submission of a dispute to the Board by the employes.

In the second place, such a holding would assume the very point to be proved. Even if it were conceded that there is an element of voluntary choice on the part of the employer when it appears before the Adjustment Board in response to a unilateral submission by the employes, it does not follow that the employer is thereby barred from subsequently resorting to the courts for the determination of its legal rights in a proceeding other than a suit under Section 3 First (p). That conclusion would follow only by making a further assumption, which would be an assumption of the very point to be proved. It would follow only if it is taken for granted that the Section 3 First (p) type of proceeding must be treated as an exclusive judicial remedy with respect to claims which have been submitted to the Adjustment Board. But that is the ultimate proposition which respondents are here attempting to establish, and it is a proposition which has already been shown to be unsound, since it is not supported either by the legislative history or by any supposed policy of the Railway Labor Act (pp. 64-79, 137-72 above), and since it is not required in order to secure to the employes advantages which Congress allegedly intended by Section 3 First (p) to secure to them (pp. 172-88 above).

Without the support of this false assumption of the very proposition which respondents are attempting to establish as the ultimate holding of the court, there is no foundation for the conclusion that the employer by participating in the proceeding before the Adjustment Board

thereby manifests a voluntary choice or election of the method of adjustment which results in depriving it of the right which it would otherwise have to resort to the courts for judicial relief.

Even if there were a foundation for the conclusion that petitioner had voluntarily chosen the adjustment procedure by appearing before the Board in response to the employes' submission, it would not follow that petitioner should be held to have waived its right to resort to the courts so as to be thereafter barred from such resort. The conclusion that petitioner should be so barred could rest only on principles of estoppel, as embodied in the so-called doctrine of election of remedies. But, as shown by the cases cited above (see footnote on pp. 170-71), that doctrine has no application unless there is a choice of one remedy giving rise to rights which are infringed by a subsequent shift to another and inconsistent remedy. Here there is no shift to an inconsistent remedy resulting in an infringement of rights. The inconsistency which must exist as a condition precedent to the application of the doctrine of the election of remedies does not consist merely of differences in methods of procedure or forms of action, but is that which arises from the irreconcilability of legal theories upon which the respective remedies are founded. In the present case there is no such inconsistency between the remedies, *i. e.*, between the theories of the two methods of determination of the controversy here involved. Whether the determination is by application to the Board of Adjustment and suit to make effective rights declared in the Board's award under Section 3 First (p) of the Act, on the one hand, or by a declaratory judgment proceeding, on the other hand—or for that matter, by a suit in court for damages by the employes, as in the *Moore* case—the rights and liabilities involved are determined by the same contract between the carrier and its employes, and the outcome depends upon the interpretation of that contract, which interpretation must be the same, regardless of the particular form of action in which the interpretation is sought.

## SECTION IV.

### (Answer to the Court's Third Question.)

THE EXPIRATION OF THE TWO-YEAR PERIOD OF LIMITATION SPECIFIED BY SECTION 3 FIRST (q) OF THE RAILWAY LABOR ACT FOR PROCEEDINGS BROUGHT UNDER SECTION 3 FIRST (p) HAS NO EFFECT IN RESTRICTING THE RIGHT OF EITHER PARTY TO THE DISPUTE TO OBTAIN A DETERMINATION OF IT IN THE COURTS IN A PROCEEDING NOT BROUGHT UNDER SECTION 3 FIRST (p), THE RESTRICTIVE EFFECT OF THE TWO-YEAR LIMITATION BEING CONFINED TO THE LATTER TYPE OF PROCEEDING; BUT ON THE CONTRARY THE EXPIRATION OF THE TWO-YEAR PERIOD SHOULD OPERATE TO PERMIT A PROCEEDING LIKE THE PRESENT ONE NOW TO GO FORWARD EVEN IF THE CONTENTION BE ACCEPTED THAT IT COULD NOT HAVE GONE FORWARD DURING THE TWO-YEAR PERIOD.

The third question put by this Court in its order of November 16, 1942, is as follows:

> "3. The effect of the expiration of the two-year period specified by Section 3 First (q) upon the right of either party to the dispute to obtain a determination of it in the courts."

Two problems are suggested by the language of this question. In the first place, the question suggests that this Court may be concerned to know whether or not or to what extent the majority of the Court of Appeals below were correct in the view which they apparently held, to the effect that the two-year period of limitation provided in Section 3 First (q) of the Act should be

construed as indicating that the employer is excluded, at least during that period, from access to the courts for determination of its rights and obligations in any other than a Section 3 First (p) proceeding, in order to preserve to the employes the advantages which Congress intended them to have in such a proceeding (pp. 241, 244, 249, 251 of 124 F. (2d); R. 335-36, 338, 345, 347). It will be shown below (pp. 197-202) that the logical conclusion from this view, which conclusion the majority of the Court of Appeals apparently recognized but did not expressly accept, is that, since the reason for holding the Section 3 First (p) type of proceeding to be the exclusive judicial remedy available to either the employes or the employer during the two-year period is to protect the advantages provided to the employes in such proceedings, that reason is no longer present after the expiration of the two-year period, when a Section 3 First (p) proceeding with its advantages is no longer available to the employes, and therefore the effect of the two-year period of limitation should be merely to *suspend* for that period the right of either party to resort to the courts for a judicial determination of the dispute in any other than a Section 3 First (p) proceeding.

In the second place, the language of the third question put by this Court also suggests—as did some of the questions asked from the bench during the original argument of the present case before this Court—that the Court may have had in mind the contention which might conceivably be made that the fact that a period of more than two years had expired since the issuance of the award involved in the present case had resulted in setting up a bar to any recovery by or relief for the employes in the courts, and that it followed that the controversy was no longer a live and active one, since the employer was no longer confronted with the possibility of having a judicially enforceable order entered against it, and accordingly the case did not now involve an actual controversy which would constitute the basis for a declaratory judgment.

Another way of stating this latter argument would be to say that, if the employes no longer had any opportunity to obtain relief in the courts in any form, then the employer would no longer be faced with the need of obtaining a declaratory judgment, and the case would therefore be moot.

At the outset, it is important to point out that these two propositions, suggested by the language of this Court's third question, are inconsistent with one another. According to the proposition first stated above, representing the view of the majority below, the right of the employer to resort to the courts on its own initiative for a judicial determination of the dispute would be suspended during the two-year limitation period in order to preserve to the employes the opportunity to make use of the advantages given them in a Section 3 First (p) proceeding, and the logical consequence of this view would be that after the expiration of that period the employer may again resort to the courts, just as, under the decision in the *Moore* case, it had that right prior to the submission of the dispute to the Adjustment Board. On the other hand, the second proposition suggested above would lead to the conclusion that neither the employer nor the employes had any right of access to the courts after the expiration of the two-year period, because there would then no longer be a live and active controversy, and the case would therefore be moot. The result of both arguments, taken together, would be to exclude the employer entirely from any right of access to the courts either during the two-year period or after its expiration, and to compel the employer to be bound by the award of the Adjustment Board, without any judicial determination of its rights and obligations under its contract with its employes.

Each of these two propositions will be considered in turn, and it will be shown that neither of them is valid to bar petitioner, under the facts of the present case, from seeking in the present declaratory judgment pro-

ceeding a judicial determination of its rights under its contract with respondents. In other words, the answer to this Court's third question must be that the expiration of the two-year period of limitation specified by Section 3 First (q) of the Act has no effect in restricting the right of either party to the dispute to obtain a determination of it in the courts otherwise than in a proceeding under Section 3 First (p), the restrictive effect of the two-year period of limitation being confined to the latter type of proceeding, and that on the contrary the expiration of the two-year period should actually operate to permit a proceeding like the present one to go forward even if the contention be accepted that it could not have gone forward during the two-year period.

The language of Section 3 First (q) of the Railway Labor Act is as follows:

> "All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

Two preliminary questions are presented by this language: First, what are the "actions at law" to which the limitation period applies; and second, what is the date from which the two-year period begins to run.

With regard to the first of these questions, the answer seems clearly to be that the restrictive effect of the limitation period is confined to suits brought under Section 3 First (p) of the Act. The language quoted above from Section 3 First (q) specifically states that the limitation therein provided applies to "actions at law based upon the provisions of this section," which can only mean actions at law based upon Section 3 of the Railway Labor Act, and the only portion of that section which provides for an action at law is Section 3 First (p). There is nothing in Section 3 First (q), or elsewhere in the Act, to indi-

cate that Congress intended the two-year limitation therein enacted to apply to any other type of proceeding than a Section 3 First (p) proceeding, and accordingly, since the language of Section 3 First (q) specifically directs the application of the limitation period to Section 3 First (p) proceedings and to no other types of proceedings, it must be construed as applying only to such proceedings.

With regard to the second preliminary question, viz., the date from which the two-year limitation period begins to run, the answer is again clear. Section 3 First (p) shows on its face that it is designed to enable a party who has obtained from the Adjustment Board a favorable award to make effective his rights as declared in that award, where the losing party fails otherwise to comply, through the means of a suit in court in which the award of the Board will be accepted as *prima facie* evidence of the facts found. Since the purpose of Section 3 First (p) thus is to permit the winning party before the Board to invoke judicial aid to make effective his rights as declared in the award of the Board, it seems clear that the date from which the two-year period within which such a suit under that section must be begun was intended to be the effective date of the award which declares the rights sought to be enforced in the suit. While the phrase used in this connection in Section 3 First (q), viz., "from the time the cause of action accrues under the award," is not as apt as it might be to describe the date of the Board's award, it is nevertheless clear that that phrase is intended to refer to the time when suit can first be brought to make effective the rights declared in the award, and that time is, of course, the day on which the award purports to become effective under the order of the Board. This interpretation as to the time from which the two-year period begins to run is the one which has been adopted by both parties throughout this case and by the Court of Appeals below, since it has been assumed

throughout that the two-year period of limitation referred to in Section 3 First (q) of the Act has now in fact expired with respect to the award of October 24, 1938. Moreover, this interpretation has apparently been accepted also by this Court, since the Court's third question plainly assumes that the two-year period has, in fact, expired, and inquires merely as to the effect of such expiration upon the rights of the parties.

Thus, it is clear that the two-year period of limitation specified in Section 3 First (q) of the Act applies only to proceedings brought under Section 3 First (p) of the Act and that the two-year period within which such a suit must be brought begins to run from the effective date of the award of the Board which declares the rights sought to be made effective in the suit. It follows that in the present case it is no longer open to the respondents to bring suit under Section 3 First (p) of the Act to make effective the rights declared in the award issued by the Board on October 24, 1938.

With the proper construction of Section 3 First (q) of the Act thus established, consideration will now be given to the two propositions referred to above as being suggested for discussion by the language of this Court's third question.

**A. If the View Apparently Held by the Majority Below is Correct, Viz., That the Two-Year Limitation Provided in Section 3 First (q) Operates to Suspend for That Period The Right of Either Party to Resort to the Courts Except In a Section 3 First (p) Proceeding, Nevertheless the Present Proceeding Should Be Permitted to Go Forward Since the Two-Year Period Has Now Expired.**

Let it be assumed that the contention of the majority of the Court of Appeals below—which is also the contention of respondents—is correct, viz., that although resort to the courts prior to submission of the dispute to the

Adjustment Board is not precluded, as this Court has held in the *Moore* case, nevertheless, following submission of the dispute to the Board resort to the courts is precluded except under the provisions of Section 3 First (p) of the Act. That view depends on the assumption, shown to be unsound and untenable (pp. 93-191), that the statutory suit provided by Section 3 First (p) was intended by Congress to be exclusive. According to that view, when a dispute arises between a carrier and its employes, which is of the kind contemplated by Section 3 of the Railway Labor Act, then the employes have a choice of alternatives: either they may, as held in the *Moore* case, seek relief in the courts in the first instance, as in a suit for damages for alleged breach of contract or in a proceeding for injunctive relief, or they may submit the dispute to the Adjustment Board in accordance with the provisions of the Railway Labor Act and may thereafter, upon receiving a favorable award from the Board, seek to make effective the rights declared in that award by instituting suit under Section 3 First (p) of the Act. If the latter alternative is adopted, then, under the view of the majority of the Court of Appeals, the Section 3 First (p) type of proceeding becomes the exclusive method of enforcing the rights declared in the Board's award, because according to that view Congress intended the Section 3 First (p) proceeding to be exclusive where a favorable award of the Board has been obtained in order to preserve to the employes the advantages given them in a suit brought under that section.

Thus, on that view, the basis for assuming that resort to the courts in any proceeding other than a Section 3 First (p) proceeding is precluded after a dispute has been submitted to the Adjustment Board and has become the subject of an award by that Board is that the Section 3 First (p) remedy must be held to be exclusive in order to insure protection of the advantages given the employes in such a proceeding. Obviously, therefore, the

logical conclusion to be drawn from that view is that where a Section 3 First (p) proceeding, with its alleged advantages, is no longer available to the employes, as in a case where the two-year period of limitation imposed on such suits by Section 3 First (q) has expired, then the reason no longer exists for holding resort to the courts in other forms of proceedings to be excluded, and judicial relief in such other forms of proceedings should therefore be held to be available to the parties under those circumstances, just as such relief on this view was available to them prior to submission of the dispute to the Adjustment Board. In other words, the view which agrees with this Court's decision in the *Moore* case and at the same time holds that the availability of a proceeding under Section 3 First (p) after an award has been issued excludes resort to the courts in other forms of proceeding should, if it is to be logically consistent, hold that the effect of the availability of the Section 3 First (p) type of proceeding is merely to *suspend* resort to the courts in other forms of proceedings for a period of two years following the issuance of the Board's award.*

Therefore, in the present case, since the two-year limitation period applicable to proceedings under Section 3 First (p) has expired, and a suit under that section, with its supposed advantages, is no longer available to the employes to make effective rights declared in the award of October 24, 1938, there is no reason, on the view here being considered, why either the employer or the employes should not again be free to resort to the courts for relief in some other form of proceeding, with respect to the

*This logical conclusion of their holding seems to have been recognized by the majority of the Court of Appeals below, as is indicated by the language used in the majority opinion in the *Moore* case in its discussion of this point (*e. g.*, R. 335-36, 338, 345, 347: pp. 241, 244, 249, 251 of 124 F. (2d)), as, for example, the following:

> "* * * because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts *during that period* to keep hands off these controversies except in the manner specified in the Act." (R. 338; p. 244 of 124 F. (2d).) (Emphasis supplied.)

practice out of which the present dispute grows, which practice is a continuing one and is still going on at petitioner's station. It follows that there is no longer any reason why the present proceeding should not be permitted to go forward to a declaratory judgment with respect to the controversy still existing between petitioner and respondents regarding the practice in question.

Of course it might be suggested that since the present proceeding was begun within the two-year suspension period it must be subject throughout to the infirmity to which it would on this view be subject during the two-year period, so that the question whether or not the proceeding should be permitted to go forward can not be affected by anything that happens while the proceeding is going on, such as the expiration of the two-year period. But surely this would be an unduly technical and futile approach. It would be an idle gesture for this Court to hold that the present proceeding must be barred because it was begun during the two-year period, although another proceeding exactly like it could be carried through to a declaratory judgment if instituted after the expiration of the two-year period, because as soon as the Court's decision to that effect were made known another proceeding exactly like this one could be instituted at once, and the Court would soon have before it exactly the same questions as it has in the present proceeding. Such a disposition of the case would amount to an empty waste of the Court's time and effort.

Accordingly, if the *Moore* case has been correctly decided and if the reasoning of Mr. Justice Black's opinion in that case is sound, then there is no reason why the present proceeding should not be permitted to go forward to a declaratory judgment, in view of the fact that the two-year period, during which it might be claimed that the Section 3 First (p) proceeding should be held to be exclusive in order to protect the supposed advantages available thereunder to the employes, has now expired.

It has of course been shown above (pp. 172-88) that there is no need to hold the Section 3 First (p) proceeding to be exclusive in order to protect the employes' supposed advantages thereunder, since the commencement of another type of proceeding on the employer's initiative, as in the present case, would not prevent the employes from instituting during the two-year period and going forward with a Section 3 First (p) proceeding in which they could secure to themselves all the advantages provided thereunder. Therefore, there is no reason for holding that resort to the courts in other forms of proceeding than the Section 3 First (p) proceeding is even suspended for the two-year limitation period, since the reason given for holding such proceedings suspended during that period, namely, to secure to the employes the advantages available to them in a Section 3 First (p) proceeding, has been shown to be unsound. But even if that reason were sound, and it were held that the right of recourse to the courts in any form of proceeding other than a Section 3 First (p) proceeding must be considered suspended for a period of two years following the effective date of an award of the Board so as to insure the availability to the employes of the advantages given them in a Section 3 First (p) proceeding, nevertheless the present proceeding should be permitted to go forward, because that bar has now been lifted with the expiration of the two-year period following the Board's award.

It results from what has been said above that, even if the first proposition suggested by this Court's third question, representing the view apparently held by the majority below, is correct, namely, that the two-year limitation provided in Section 3 First (q) must be construed as suspending for that period the right of either party to resort to the courts except in a Section 3 First (p) proceeding, nevertheless that proposition does not now bar the present proceeding, which should be permitted to go

forward to a declaratory judgment, since the two-year period has now expired. It remains to consider the second proposition suggested by this Court's third question.

**B. The Fact That the Two-Year Period of Limitation Has Expired in the Present Case Does Not Render the Case Moot Or Constitute a Bar to Its Going Forward to a Declaratory Judgment.**

It will be recalled that the second proposition suggested by the Court's third question, which was also suggested by some of the questions from the bench during the original argument, is the contention which might be made that, since the two-year limitation period has expired, the employes are now wholly barred from obtaining judicial relief in any form of proceeding with respect to the dispute in question, with the result that the employer is no longer confronted with the danger of having a judicially enforceable order entered against it and accordingly the case no longer involves an actual and existent controversy which would constitute the basis for a declaratory judgment. To state it in another way, the purport of this contention is that the employer is no longer in need of a declaratory judgment and the case is therefore moot.

However, examination of the matter will show that this contention is unsound because its premise is unsound, and that the employes are in fact not barred, by the expiration of a period of two years from the date of the Board's award, from recourse to the courts for relief in connection with the dispute in question, except that they are of course barred from bringing a suit under Section 3 First (p) of the Act predicated upon the Board's award of October 24, 1938.

It has been shown above (pp. 24-191) that neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts at any time, either before or after submission of the dispute to the Board. With refer-

ence to the employes this has been specifically shown at pages 167-72 above. Since this is so, and since the substantive legal basis on which the employes' claim is founded and which gives rise to the substantive rights asserted by them is not the Railway Labor Act but the contract between the parties and the ordinary principles of contract law applicable thereto (see pp. 27-30 above), the governing statute of limitations, in any legal proceeding brought by the employes to enforce their contract rights other than a proceeding under Section 3 First (p) of the Railway Labor Act, would be the ordinary statute of limitations applicable to such an action to enforce contract rights, and not the two-year limitation period provided in Section 3 First (q) of the Railway Labor Act. As already demonstrated (pp. 195-96 above), the two-year limitation period therein provided is specifically and simply a limitation on suits begun under the provisions of Section 3 First (p) of the Act. Such being the case, it follows that the only effect of the expiration in the present case of a period of two years from the date of the Board's award is that any suit by an employe or employes under Section 3 First (p) of the Act is now barred.

Let it be supposed, for example, that employes having a dispute with their carrier-employer growing out of a contract between the carrier and its employes brought suit in a state court, claiming damages for breach of the contract. Obviously, the statute of limitations applicable to such a suit would be, not the provisions of Section 3 First (q) of the Railway Labor Act, but the ordinary state statute of limitations applicable to actions for breach of contract in that state. If such a suit may be maintained by the employes, notwithstanding the fact that the dispute is one which might be, or in fact had been, submitted to the Adjustment Board, then it is plain that the suit could be maintained at any time within the limitation period provided in the state statute of limitations, regardless of the provisions of Section 3 First (q) of the Rail-

way Labor Act. The same thing would, of course, be true with respect to a proceeding brought in a state court to enjoin a threatened breach of contract between the carrier and its employes, and the governing statute of limitations in such a case would be the applicable state statute of limitations and not the provisions of Section 3 First (q).

In the ordinary case the proper forum for a suit for damages for breach of contract or for injunctive relief would be a state court, with respect to contracts between carriers and their employes as well as with respect to other types of contracts, since the substantive rights sought to be enforced in such a suit grow out of the contract and not out of the Railway Labor Act, which does no more than create a new and additional remedial procedure for the enforcement of those rights (see pp. 24-31 above). The mere fact that an employe of a carrier has a dispute with his employer growing out of a contract alleged to exist between them and that such a dispute is one which might have been submitted to and determined by the Adjustment Board is not a sufficient ground of Federal jurisdiction except in a suit under Section 3 First (p) of the Railway Labor Act. In the absence of some ground which is adequate to support Federal jurisdiction, such as diversity of citizenship, an ordinary suit for damages or for injunctive relief with respect to a contract between a carrier and its employes cannot be maintained in a Federal court but must, like other suits based on private contracts, be brought in a state court.*

In the present case, since the dispute arises in the District of Columbia, the court which would have jurisdiction of an ordinary suit for damages or injunctive relief with respect to a dispute growing out of the contract in question between petitioner and its employes happens to be the same court as that which would have jurisdiction of

* See footnote on p. 30 above and cases cited therein. It will be noted that the great majority of the cases which have in fact arisen with respect to contracts between carriers and their employes have been in the state courts. See cases cited above, pp. 25-30.

a suit under Section 3 First (p), viz., the District Court. However, the analogy to a suit brought in a state court subject to a state statute of limitations still applies, and a suit brought in the District Court for the District of Columbia to recover damages for breach of a contract between petitioner and its employes would be subject to the ordinary statute of limitations applicable to other suits brought in that District Court for damages for breach of contract. The statutory period applicable to such suits under the District of Columbia Code is three years (Title 12, District of Columbia Code, 1940 edition, Sec. 12-201). Accordingly, assuming that an action for damages for breach of contract may be maintained by the employes notwithstanding the fact that the dispute has been submitted to the Adjustment Board and has been the subject of an award by the Board, the employes may at any time bring suit in the District Court for the District of Columbia to recover damages for the alleged breach of their contract with petitioner, and in such suit the employes would be entitled to recover damages for any breach or breaches of contract which they proved to have taken place within the period of three years prior to the institution of the suit. Since the practice which the employes claim to be a breach of contract in the case of the present dispute has been and is a continuing one, there would undoubtedly be instances of that practice on which the employes could found such a suit, as constituting alleged breaches of the contract committed within the period of three years prior to the institution of suit.

Thus, since, as has been shown above, the employes are free, either prior to submission of a dispute to the Board or at any time after the dispute has been so submitted, to institute a suit in the courts for damages for alleged breach of contract or for injunctive relief, it follows that such a suit may be instituted for any alleged breaches committed within the period of limitation provided in the statute of limitations applicable to such a suit and

that it is immaterial whether or not the two-year period provided by Section 3 First (q) of the Railway Labor Act, as a limitation upon suits brought under Section 3 First (p), has expired. Even though that two-year limitation period has expired in the present case, it is still possible for the employes to bring suit in court, in some form, to enforce the very contract rights which they claim to have and which petitioner in the present proceeding denies that they have and upon the determination of which the substantive issue at stake in the present proceeding depends. Therefore, the present proceeding, the ultimate purpose of which is to determine that issue, involves a controversy which is still a live and active one, and accordingly the proceeding should be permitted to go forward to a declaratory judgment with respect to that controversy.

The foregoing argument has proceeded on the basis of petitioner's contention, developed in earlier parts of this brief (Sections I and III above), that neither party to a dispute over which the Adjustment Board has authority is precluded from seeking a determination of the dispute by the courts either before or after submission of the dispute to the Adjustment Board. Let it be supposed, however, for the purpose of argument that a contrary assumption be accepted, and that it be assumed either (*a*) that a dispute may be submitted to the courts only *before,* but *not after,* submission to the Adjustment Board, or, on the other hand, (*b*) that a dispute over which the Adjustment Board has authority may not be submitted to the courts at all except in a proceeding brought under Section 3 First (p). Still it would follow that on neither of these assumptions would it be a proper ground for dismissing this proceeding that there is no longer a live and active controversy or that the case has become moot.

Let it be assumed in the first place that the view of the majority below is correct and that, although the employes are free to resort to the courts in the first instance, under the *Moore* decision, nevertheless after submission of the

dispute to the Board their right to resort to the courts except in a Section 3 First (p) proceeding is at least suspended for a period of two years following the issuance of an award in their favor. In that event, as already shown (pp. 197-202 above), neither the employes nor the employer is now precluded from access to the courts because the two-year period has now expired and the bar interposed thereby has been lifted. Therefore a live and active controversy now exists, which the employes may at any time take into court, and which accordingly constitutes a proper basis for a declaratory judgment. It follows that, on this view, the case cannot properly be dismissed as moot.

In the second place, let it be supposed that the extreme view is taken and it is held that resort to the courts by the employes as well as by the employer is barred altogether and at all times, except in a Section 3 First (p) proceeding. This view, which would of course require the overruling of the *Moore* decision, has been shown to be wholly untenable and without foundation in the Act (pp. 24-81 above). But even if it were accepted, still the present case could not properly be dismissed on the ground that it is moot. Even on this extreme view, and even though the two-year limitation period has expired, there is nevertheless nothing to prevent the employes from going back to the Board and obtaining a new award with respect to the practice here in question, *i. e.*, the practice, still continuing at petitioner's station, of using road engines manned by road crews to move trains of empty cars between the storage yard and the station. The fact that the employes still have this opportunity of obtaining a new award with respect to the same practice and of bringing suit under Section 3 First (p) to make effective the rights declared in the new award is sufficient to make it clear that the controversy at issue in the present proceeding is still a live and active one and the case is not moot, even

though on the extreme view now under discussion the employer would not be permitted to bring the present suit, because of the other assumptions upon which that extreme view is founded.

It must be remembered that the present suit is not a suit to recover damages alleged to have resulted from the performance of particular acts on a particular day or days. If it were that kind of a suit, and if the statutory period of limitation applicable to it had expired, the suit could properly be dismissed on that ground. But the present suit is not that kind of a suit. It is a suit to have a judicial declaration as to the rights and obligations of the parties with respect to a *continuing* practice, one which has been going on at petitioner's station for many years and is still going on and will in all probability continue in the future unless petitioner is required—by judicial order or by economic pressure—to change it. If respondents are correct in their contention that this practice at petitioner's station constitutes a violation of the contract between petitioner and respondents, then such violations have been and are occurring every day. Accordingly, the dispute between petitioner and respondents is a continuing one and is still actively in existence, and it is therefore open to the employes to submit the dispute again to the Adjustment Board and obtain a new award on which a suit under Section 3 First (p) could be based. It follows that, apart from the assumptions as to the intent of the Railway Labor Act, on which this extreme view is founded, and which would bar the present proceeding, the reasons for permitting the present proceeding to go forward to a declaratory judgment would still exist, because the controversy is still a live one, and the dangers with which the carrier is confronted (see pp. 113-23 above), as a result of permitting such a dispute as this one to continue without being judicially determined—as it never would be if a proceeding like the one at bar were not permitted to go forward—are equally present.

Thus, it would be a vain thing for this Court to dismiss the present case on the ground that the controversy had ceased to be active or that the case had become moot. The controversy between the parties is still a live and active one, and, as shown above, whatever theory may be adopted as to the proper construction to be given Section 3 First (p) of the Act, the way is still open for the employes to seek relief, in some form of proceeding, for the alleged continuing violation of their contract, and meanwhile to hold this possibility as a club over the carrier's head, which, together with the economic pressure that the employes are capable of bringing to bear, can be used to compel the carrier to yield to their contention without a judicial determination of the rights and obligations of the parties, unless a declaratory judgment is permitted.

The conclusion to be drawn from all that has been said above is that the answer to this Court's third question must be that the expiration of the two-year period of limitation prescribed in Section 3 First (q) for suits brought under Section 3 First (p) of the Act has no effect whatever in restricting the right of either party to the dispute to obtain a determination of it in the courts, other than the fact that a proceeding brought by the employes under Section 3 First (p) predicated upon the Board's award of October 24, 1938, would now be barred. On the contrary, so far from having a restrictive effect, the expiration of the two-year period should actually operate to permit a proceeding like the present one now to go forward, even if the contention be accepted that it could not have gone forward during the two-year period.

## SECTION V.

### (Answer to the Court's Fourth Question.)

THE WORDS "FINAL AND BINDING" IN SECTION 3 FIRST (m) OF THE RAILWAY LABOR ACT CANNOT, CONSISTENTLY WITH OTHER PROVISIONS OF THE ACT, BE CONSTRUED AS HAVING ANY RESTRICTIVE EFFECT UPON THE RIGHT OF EITHER PARTY TO THE DISPUTE TO RESORT TO THE COURTS OR UPON THE SCOPE OF JUDICIAL CONSIDERATION OF THE DISPUTE EITHER DURING THE TWO-YEAR PERIOD OF LIMITATION PRESCRIBED BY SECTION 3 FIRST (q) FOR PROCEEDINGS UNDER SECTION 3 FIRST (p) OR AFTER THE EXPIRATION OF THAT PERIOD.

The fourth question put by the Court in its order for re-argument is as follows:

> "The effect of the words 'final and conclusive' in Section 3 First (m) upon the right to resort to the courts and upon the scope of judicial review, (*a*) during the two-year period, and (*b*) after expiration of the two-year period."

As pointed out above (p. 20), the phrase which the Court apparently had in mind in formulating this question appears in the Act as "final and binding" and not as "final and conclusive." The relevant portion of Section 3 First (m) of the Act is as follows:

> "• • • the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

What alternatives are presented as to the construction of the phrase "final and binding" as used in this context?

Three possible constructions of the phrase suggest themselves: *first*, it might conceivably be construed to mean—although there is no substantial basis for such a construction—that an award of the Board other than a money award should preclude altogether resort to the courts by either party with respect to the issues considered and determined by the Board, and that the courts are without authority to consider anew those issues in any respect; or, *second*, the phrase "final and binding" might possibly be construed to mean—although again there is no substantial basis for such a construction—that, while resort to the courts was not excluded and the courts were not altogether prohibited from considering the issues determined by the Board, nevertheless the phrase was intended to limit in some way the scope of judicial consideration with respect to the issues involved in the award, as, for example, by confining it to a consideration solely of questions of law, so that the award of the Board would be considered "final and binding" as to questions of fact; or, *third*, the phrase may have been intended to mean that the award should be considered "final and binding" in any further proceedings before the Board and unless the award should become the subject of judicial consideration in a proper proceeding in court and should be judicially pronounced incorrect or invalid in such a proceeding. Examination of these three alternative constructions will show that neither the first nor the second suggested alternative is tenable, and that the third suggested construction is the one which, in view of other provisions of the Act, can be accepted consistently with the other provisions of the Act. Furthermore, it will be shown that the phrase "final and binding" cannot be construed as precluding resort to the courts or limiting the scope of judicial consideration with respect to an award of the Board, regardless of whether or not the two-year period of limitation following the date of the award has expired.

**A. The Phrase "Final and Binding" Cannot, Consistently With Other Provisions of the Railway Labor Act, Be Construed as Precluding Altogether Resort to the Courts for Judicial Consideration and Determination with Respect to the Issues Involved in an Award of the Board, Or as Limiting Such Resort To Proceedings Brought by the Employes Under Section 3 First (p) of the Act.**

The first possible construction which the phrase "final and binding" might conceivably be given is that an award of the Board must be regarded as the very last word of any tribunal, with respect to the issues determined by the Board in making the award, and that resort to the courts for a judicial consideration and determination with respect to those issues is absolutely precluded. Apart from constitutional objections to a construction which would give an award of the Board such complete and absolute finality (see pp. 238-44 below), it is obvious that the phrase could not have been intended by Congress to have such a meaning, in view of other provisions of the Act. For example, Congress has specifically provided, in Section 3 First (p), a means whereby at least the employes may obtain a judicial re-examination and determination of the issues involved in the Board's award. If the phrase "final and binding" were intended to mean that the issues determined by the Board in making the award were not open to judicial consideration of any kind, then, in order to be consistent with the provisions of Section 3 First (p), the phrase in Section 3 First (m) should have read "final and binding except in a proceeding brought under Section 3 First (p)." But the phrase "final and binding," as it is actually used in Section 3 First (m), is not thus qualified, so that if "final and binding" means, "exclusive of judicial consideration of the issues involved," then there is a serious inconsistency between the use of that phrase in Section 3 First (m) and the provisions of Section 3 First (p). Clearly a construction which would lead to such an inconsistency is untenable.*

*See also the discussion at pp. 139-42 above.

In fact, respondents expressly admitted in their brief in the District Court below the untenability of the construction here being considered. In that brief respondents, after quoting the relevant language of Section 3 First (m), said (Defendants' Memorandum Brief, p. 34; R. 100):

> "From other sections of the Act, however, it is apparent that the 'finality' given to the awards of the Board is *an administrative finality only. There is no intention of attempting to preclude a judicial review.*" (Emphasis supplied.)

Thus, respondents expressly conceded in that brief that the phrase "final and binding" is not to be construed as intended to exclude resort to the courts. However, that concession on the part of respondents was retracted in their original brief in this Court, wherein they took the position that "final and binding" meant that awards of the Board should be regarded as final "unless set aside in the course of proceedings specifically authorized for the purpose of their review" (Respondents' Brief in Supreme Court, pp. 42, 55). Thus in that brief respondents contended that "final and binding" meant that an award was final in the sense that it excluded resort to the courts, except in a Section 3 First (p) proceeding. In that way respondents would construe "final and binding" so as to avoid inconsistency with Section 3 First (p) and yet as excluding the employer from a right of access to the courts, by supposing that "final and binding" indicated an intent to exclude resort to the courts by the employer, while the remedy under Section 3 First (p) remained available to the employes. Respondents in their brief then relied on that construction of the phrase "final and binding" as substantiating their position that Section 3 First (p) proceedings were intended by Congress to be exclusive of all other types of proceedings to obtain judi-

cial consideration of issues involved in an award of the Board.

But this construction of the phrase is clearly untenable, for two reasons. In the first place, it obviously assumes the very point to be proved, namely, that the Section 3 First (p) type of proceeding was intended by Congress to be exclusive of all other proceedings to obtain a judicial consideration of the issues involved in an award of the Board. In other words, to impute to Congress the intent that an award shall be final and binding except in a Section 3 First (p) proceeding is to assume that Congress intended such proceedings to be exclusive. Thus, respondents first assume what they are trying to prove, viz., that the Section 3 First (p) type of proceeding is exclusive, and then they invoke the aid of that assumption to construe "final and binding" as meaning that awards of the Board are final in all proceedings other than in Section 3 First (p) proceedings. Moreover, having thus established to their satisfaction a construction of the phrase "final and binding," respondents in their brief (pp. 41-42) then proceed to rely upon that construction in order to prove the basic assumption on which that construction rests, namely, that Section 3 First (p) proceedings were intended by Congress to be exclusive. This is a conspicuous example of the circular reasoning which pervades their whole argument.

In the second place, construction of the phrase "final and binding" as meaning that an award of the Board is final and not subject to judicial consideration of the issues involved therein except in a Section 3 First (p) proceeding is plainly contrary to the express language of the Act. Such a construction would necessarily carry with it the consequence that awards of the Board are "final and binding" except when the employes choose to treat them as not being "final and binding," by bringing a Section 3 First (p) proceeding. This inevitably follows from the fact that Section 3 First (p) proceedings can be brought

only upon the initiative of the employes, so that, on this construction, it would lie wholly within the discretion of the employes to determine whether or not an award is to be given a "final and binding" effect. The obvious result of such a construction would be that an award of the Board would be final with respect to one of the parties to the dispute, namely, the employer, but would not be final with respect to the other party to the dispute, the employes, who could at any time within the limitation period take action by bringing a Section 3 First (p) proceeding which would result in the award being subject to challenge and might lead to its being modified or set aside. But this is clearly contrary to the language of Section 3 First (m). The language of that section is that awards of the Board "shall be final and binding *upon both parties*" (Emphasis supplied). A construction of the Act which treats an award of the Board as "final and binding" with respect to one of the parties but not with respect to the other obviously disregards this language and gives an award the effect of being final and binding with respect to one of the parties alone.

Another possible modification of the view that the phrase "final and binding" is intended to preclude resort to the courts should be considered. It might conceivably be contended that Section 3 First (m) and Section 3 First (p) of the Act could be harmonized, and still be construed as precluding resort to the courts in a proceeding like the present one, by supposing that the provision in Section 3 First (m), to the effect that "awards shall be final and binding * * * except in so far as they shall contain a money award," means that Section 3 First (p) proceedings are available to employes only with respect to money awards. But such a construction would be clearly untenable, in view of the language of Section 3 First (p) itself. Section 3 First (p) expressly states that, in any case where "a carrier does not comply with *an order*" of a division of the Adjustment Board, pro-

ceedings under that section may be brought by "the petitioner, or *any person for whose benefit such order* was made" (Emphasis supplied). Thus, the language of Section 3 First (p) plainly indicates that proceedings thereunder are available with respect to *any* order which the carrier in question does not obey, the only limitation being that the proceeding may be brought only by "the petitioner"—*i. e.*, the claimant before the Board—"or by any person *for whose benefit*" the order was made. To construe this provision as meaning that such proceedings are available only to persons for whose benefit an order based on a money award has been made is to read into the section language which is not there and which is inconsistent with the language that is there.

Another provision in Section 3 First (p) which makes it plain that that section was not intended to be confined to suits involving money awards is found in the last sentence of Section 3 First (p). That sentence is as follows:

> "The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, *by writ of mandamus* or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board." (Emphasis supplied.)

Thus, Section 3 First (p) contemplates that the order of the Board which is sought to be made effective in a suit brought under that section may be such an order as can be appropriately enforced by a *writ of mandamus*. Obviously this would not be the case if it were the intent to confine suits under Section 3 First (p) to cases where the order merely directed the payment of money, in compliance with a money award, since *mandamus* is not the appropriate remedy to enforce an order for the payment of money, but is rather a remedy to be invoked where the order requires some affirmative change in conduct or practice.

In view of these provisions of Section 3 First (p), the phrase "final and binding • • • except in so far as they shall contain a money award" cannot be construed as limiting Section 3 First (p) to suits involving money awards.

From these considerations it follows that the phrase "final and binding" is not to be construed as manifesting a Congressional intent that resort to the courts for judicial consideration of the issues determined by the Board should be barred altogether, or that it should be barred except in a Section 3 First (p) proceeding, or that the latter type of proceeding is available only with respect to money awards. The next question therefore is whether or not that phrase is to be taken as indicating a Congressional intent that the scope of such judicial consideration should be limited in some undefined way.

**B. The Phrase "Final and Binding" Cannot, Consistently With Other Provisions of the Railway Labor Act, Be Construed as Limiting the Scope of Judicial Consideration With Respect to the Issues Involved in an Award of the Board.**

The second possible construction which the phrase "final and binding" might conceivably be given is that, although it is not intended to preclude altogether resort to the courts for judicial consideration and determination with respect to the issues involved in an award of the Board, nevertheless it is intended to limit the scope of such judicial consideration. If this is the proper meaning of the phrase, then there is no indication on the face of the Act as to the extent to which or the manner in which the scope of such judicial consideration should be thus limited. However, it might possibly be suggested, on so-called general principles of administrative law, that an award of the Board should be given an absolute finality with respect to issues of fact, thereby limiting the scope of

judicial consideration to questions of law, such as, for example, questions concerning the jurisdiction of the Board, the interpretation of statutory provisions, constitutional questions, and other similar questions of a purely legal character.

But this supposition as to the proper construction of the phrase "final and binding" not only has no foundation in the Act but is plainly inconsistent with other provisions of the Act. If, as this supposition assumes, the award of the Board is to be regarded as absolutely and conclusively final with respect to questions of fact determined by the Board, then all re-examination or re-consideration of such questions of fact in a judicial proceeding would be precluded. But the provisions of Section 3 First (p) make it clear that such was not the intent of Congress. Section 3 First (p) expressly provides that in a suit brought under that section the "findings and order" of the Board shall be "*prima facie* evidence of the facts therein stated." Thus, the effect of the "findings" or award of the Board is limited to constituting only *prima facie* evidence of the facts, which obviously means that such findings or award are subject to rebuttal in the judicial proceeding by evidence showing contrary or inconsistent or different facts. In other words, the clear conclusion to be drawn from the provision of Section 3 First (p) limiting the effect of the Board's award to that of "*prima facie* evidence of the facts" is that the issues of fact determined by the Board are subject to re-examination in the judicial proceeding and that the *prima facie* effect of the award may be rebutted or set aside altogether upon a showing by sufficient evidence that the issues of fact had been incorrectly determined by the Board.

Clearly, therefore, the phrase "final and binding" cannot, consistently with other provisions of the Act, be regarded as intended to limit the scope of judicial consideration and determination with respect to the issues involved in an award of the Board.

**C. The Phrase "Final and Binding" Can Properly Be Construed Only as Meaning That an Award of the Board is Final and Binding In Any Further Proceeding Before the Board and Unless It Should be Judicially Pronounced Incorrect or Invalid in a Proper Court Proceeding.**

Since, as pointed out above, the phrase "final and binding" cannot properly be construed as intended either to preclude altogether resort to the courts or to limit the scope of judicial consideration with respect to the issues involved in an award of the Board, there remains only the third alternative construction, namely, that an award of the Board shall be considered final and binding in any further proceedings before the Board, and unless it should become the subject of judicial consideration in a proper proceeding in court and should be judicially pronounced incorrect or invalid in such a proceeding. This is the construction which petitioner submits is the correct one, and which respondents likewise thought to be the correct one in making the statement quoted above (p. 213) from their brief in the District Court below. In that brief they said (R. 100): "* * * it is apparent that the 'finality' given to the awards of the Board is an administrative finality only." This can mean only that respondents conceded that the effect of the phrase "final and binding" is limited to the effect to be given an award in other proceedings before the Board and that the phrase is not intended to indicate that the award has any such finality as to preclude a judicial proceeding properly brought to consider and determine the issues involved in the award.

This construction of the phrase "final and binding" has support in the decided cases. In *Cook* v. *Des Moines Union Ry. Co.*, 16 F. Supp. 810 (S. D. Iowa, 1936), an employe was permitted to recover damages in a suit under Section 3 First (p), the employe having first obtained an award from the Adjustment Board sustaining his claim. Among other contentions made by defendant, it was

argued that the provision in Section 3 First (m) to the effect that awards of the Board should be "final and binding upon both parties" deprived defendant of its constitutional rights, including the right of due process. In response to this contention the court said (pp. 813-14):

> "It is unnecessary to determine whether or not this might be a depriving of due process in certain cases, but here certainly the Des Moines Union is not deprived of any constitutional rights. *The purport of the act may be to provide that the award made by an Adjustment Board shall be final so long as it is not attempted to be enforced. No provision is made in the act for the enforcement of any award or decision of the Adjustment Board,* and therefore there is no deprivation by the railway company of any rights unless and until the suit is filed in the District Court of the United States for its enforcement. When this is done it becomes an action at law with the right of a jury. *The entire case is open for trial as a law action on the original suit.*" (Emphasis supplied.)

Thus, the view taken by the court in that case of the proper interpretation of the phrase "final and binding" was that that phrase was to be regarded as making an award of the Board (except in so far as it was a money award) binding upon the parties but only unless the award came properly before a court for judicial consideration and determination with respect to the issues involved in the award, and that when those issues were adequately presented for judicial consideration the award of the Board had no effect in precluding or limiting the court's consideration of them.*

That view is further substantiated by, and is in fact the only construction consistent with, the cases holding

* The view thus taken by the court in the *Cook* case was cited with apparent approval by Spencer in his article on the Adjustment Board, referred to above (see Compilation, p. 204 of Appendix thereto).

that the existence of an award of the Board does not foreclose a court having proper jurisdiction from declaring the award void or re-examining the issues involved in the award.* Indeed, this is the only construction of the phrase "final and binding" which is consistent with the view, accepted by all authorities and admitted by respondents, that an award of the Board does not in and of itself constitute a cause of action and is not self-enforcing or enforceable as such (pp. 27-30 above). Since, as already pointed out (p. 218), an award of the Board is given by the Act no greater status or effect than that of constituting *prima facie* evidence of the facts, it is plain that the award was not intended to be "final and binding" in any sense which would preclude or restrict a court's consideration and examination of the basic issues involved. Obviously, if an award of the Board amounts to no more than *prima facie* evidence, and if a court is therefore free to re-examine the issues involved and to reach its own conclusion with respect to both the facts and the law, the award is in no sense "final and binding" upon the court, and the application of that phrase must therefore be limited to the status of the award prior to such time as it may be judicially considered and corrected in a proper court proceeding.

Thus, this construction of the phrase "final and binding" is the only one which is consistent with other provisions of the Act, according to their plain meaning and the construction placed upon them by the decided cases. Moreover, it is a construction which gives full sense and effect to the phrase in question, especially when considered in its entirety. That phrase is that awards shall be "final and binding upon both parties to the dispute except in so far as they shall contain a money

* See, for example, *Nord* v. *Griffin*, *supra* (p. 26 above), *Stephenson* v. *N. O. & N. E. Co.*, *supra* (p. 30 above), *Lane* v. *Union Terminal Co.*, *supra* (p. 30 above), *McDermott* v. *N. Y. Cent. R. Co.*, *supra* (p. 30 above), *System Federation No. 59, etc.*, v. *Louisiana & A. Ry. Co.*, 30 F. Supp. 909, 912 (W. D. La., 1940), affirmed, 32 F. Supp. 89, 119 F. (2d) 509.

award." It has been pointed out above (p. 215) that the words "upon both parties to the dispute" are not given effect if the phrase is construed as excluding the employer from resort to the courts, while the construction here being considered does give full effect to those words. Similarly, the appropriateness of this construction becomes clear when the distinction drawn between money awards and non-money awards is considered. It seems entirely reasonable to regard an award which determines the propriety of an operating practice as "final and binding" in other proceedings before the Board between the same parties involving the same practice under the same contract and the same operating conditions. But it might not be reasonable to treat a money award as "final and binding" in other proceedings before the Board involving other claims, even though the claims might grow out of the same or similar operating practices. For example, in the present case it might properly be claimed that, if the question of the propriety of the operating practice here involved—namely, the practice at petitioner's station of using road engines to move empty passenger cars between the station and the storage yard—came before the Adjustment Board in another proceeding, the Board's prior decision with regard to that practice should, in the absence of a change in the basic relations between the parties or in their contract, be treated as "final and binding." However, the award of the Board, in so far as it sustained the claims of respondents for money damages for petitioner's failure to permit them to do the work in question on particular days, obviously could not be treated as "final and binding" in another proceeding involving the claims of the same employes for failure to permit them to do the work on other days, even though the claims grew out of the same operating practices. Clearly, the distinction drawn in the phrase in question, between awards of the Board in so far as they involve non-money awards and in so far as they involve money awards, is

a sensible and reasonable one, and emphasizes the appropriateness of the construction here being considered, viz., that the words "final and binding" mean, final in other proceedings before the Adjustment Board and until the award has become the proper subject of judicial consideration and has been judicially pronounced incorrect or invalid.

The fact that an administrative determination may properly be regarded as "binding" and yet as not precluding a judicial examination and determination of the rights of the parties to the extent needed adequately to protect those rights is shown by the decision of this Court in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938). There this Court, speaking through Mr. Chief Justice Hughes, said, with regard to a determination by the Interstate Commerce Commission that a railroad did not constitute an interurban electric railway within the meaning of the Railway Labor Act (p. 182 of 305 U. S.):

> "• • • in view of the nature and purpose of the proceeding we must regard the determination as *binding* on both the carrier and the Mediation Board." (Emphasis supplied.)

But, although this Court thus held that the Commission's determination was "binding" upon the parties, it nevertheless accorded to the railroad a judicial review of that determination, even though no statutory proceeding for such review was available. The effect of that decision therefore is that judicial review is not precluded by the fact that the administrative determination may properly be regarded as "binding" upon the parties.

A different view with respect to the proper construction to be given the phrase "final and binding" appears to be suggested by some of the language in the opinion of a California District Court of Appeals, in the case of *Austin* v. *Southern Pacific Co.*, 50 Cal. App. (2d) 292, 123

P. (2d) 39 (March 3, 1942), a case cited by respondents in their brief in this Court on the original argument. In that case the plaintiff, a dining car employe, sought restoration of alleged seniority rights, damages for breach of his contract governing those rights, and an injunction against the union to restrain it from interfering with the plaintiff's claimed seniority status. The complaint was dismissed on demurrer, the principal ground of the decision being that, although the complaint had been amended several times and plaintiff's counsel refused to amend it further, it failed to allege sufficient facts showing a substantive basis, contractual or otherwise, for the claimed seniority rights. Purely by way of dictum, the court added a suggestion that the plaintiff, whose claim had been submitted to and rejected by the Adjustment Board, had thereby made his "election" and so was not free to seek in the courts relief which had been denied him by the Adjustment Board. In making that suggestion, the California Court referred to the decision of this Court in the *Moore* case and also to *Adams* v. *New York, C. & St. L. R. Co.*, 121 F. (2d) 808 (C. C. A. 7th, 1941), and then went on to say (p. 299 of 50 Cal. App. (2d)):

> "The appellant, according to the face of his complaint, made his election and invoked the board's jurisdiction. Subdivision (m) of the last-mentioned section of the act provides '• • • the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award'."

There was no further comment by the court on this latter provision of the Act.

Obviously, no weight can be accorded this decision on the question of the proper construction to be given the phrase "final and binding," in the connection in which it is relevant in the case at bar, for several reasons. In

the first place, the ground of the court's decision was the plaintiff's failure to allege a contractual or other substantive basis for his claimed seniority rights, so that the complaint failed to state a cause of action. Therefore, the court's statement with respect to "election" and the phrase "final and binding" was purely dictum. In the second place, there is no discussion in the court's opinion of its view as to the proper construction to be placed on the phrase "final and binding," which is simply cited in passing, without any comment. In the third place, with regard to the suggestion that the plaintiff had made his "election," the court bases this suggestion entirely on the decision of this Court in the *Moore* case and on the decision in the *Adams* case, *supra*. But of course this Court did not decide in the *Moore* case that a plaintiff who had chosen to invoke the statutory method for "adjustment" of his claim was thereafter barred from seeking relief in the courts in other than statutory proceedings. This Court said in the *Moore* case that the employe could elect either to submit his claim to the Adjustment Board or resort to the courts in the first instance, but it did not say that an employe whose claim had been rejected by the Board was thereafter barred from access to the courts, and, as shown above (pp. 62-64, 167-72), such a holding would be inconsistent with the reasoning in the opinion in that case. Nor was that proposition established in the *Adams* case. It will be recalled that in that case the District Court had held that an employe was not entitled to resort to the courts in the first instance where the adjustment machinery provided by the Railway Labor Act was available and applicable to his dispute, but this was reversed by the Circuit Court of Appeals on the authority of this Court's decision in the *Moore* case. All that the Circuit Court of Appeals said, in making that decision in the *Adams* case, was that "the employees' action may be brought, at their election, either in a court, or settled by the administrative remedies

prescribed by said Act." Thus, the Circuit Court of Appeals in the *Adams* case ultimately permitted the employe, who had not gone to the Board at all, to proceed with his suit, and it neither held nor said in its opinion that an employe who first submitted his dispute to the Board would if rejected by the Board be thereafter barred from relief in the courts.

Plainly, therefore, the California court in the *Austin* case could derive no support whatever from either the decision of this Court in the *Moore* case or the decision of the Circuit Court of Appeals in the *Adams* case for its dictum that an employe whose claim had been rejected by the Adjustment Board was "bound" thereby and could not seek relief in the courts. Moreover, not only is that dictum without support either in the cases or in the Act, but it is contrary to other decided cases, which, as pointed out above (pp. 167-70), have held that an employe whose claim has been rejected by the Board is not barred from thereafter seeking relief in a proper court.

Another decision which should be noted is the recent decision of a Federal District Court of Missouri in the case of *Berryman* v. *Pullman Co.*, not reported (W. D. Mo., November 6, 1942). In that case a negro Pullman porter who had been discharged had presented his claim to the Adjustment Board, which had denied the claim. Thereafter he brought suit in the Federal District Court, alleging diversity of citizenship and seeking recovery of wages and reinstatement as an employe of the defendant. In granting summary judgment for the defendant, the District Court referred to the phrase "final and binding," pointed out that the award of the Board in question contained no money award, and concluded that it was not open to the court to reconsider the action of the Adjustment Board. This cursory reasoning of the court, in a very brief opinion which enters into no analysis of the problem, is so clearly contrary to the many considerations set forth above and to the other decided cases, to

the effect that the phrase "final and binding" cannot be construed as precluding consideration by a court of the issues involved in an award, that it must be rejected as hasty and superficial.

However, even if the result reached by the court in that case should be accepted as correct, still it would not lead to a dismissal of the case at bar. In the *Berryman* case, as in the *Austin* case, the plaintiff had voluntarily chosen to submit his claim to the Adjustment Board and it had been rejected by that Board. As stated by the court in that case, "He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it." Thus, the result reached in that case might conceivably be sustained on the theory of an election of remedies and estoppel to change to another remedy after the first remedy has failed. As pointed out above (pp. 167-70), petitioner believes such a view to be unsound and takes the position that the sounder view is that represented by the cases holding that an employe whose claim has been rejected by the Adjustment Board is not thereby barred from submitting his claim to a proper court having jurisdiction thereof. But even if it should be held that those cases are wrong and that the result reached in the *Berryman* case is right, nevertheless it would not follow that petitioner is barred in the present case, since there has been no choice or election of remedies on the part of petitioner here. For the reasons set forth in Section II of this brief (pp. 82-92 above), petitioner had no alternative except to appear before the Adjustment Board and defend itself as best it could, in response to the unilateral submission of the dispute to the Board by the employes. Accordingly, there is no basis whatever for invoking against petitioner in this case any doctrine of estoppel or waiver based on election of remedies, and therefore the result reached in the *Berryman* case, even if accepted as correct, cannot be considered as a precedent against the maintenance of the present suit.*

* See also discussion above at pp. 171-72 and 188-91.

It follows from what has been said that the only construction of the phrase "final and binding" which is consistent with other provisions of the Railway Labor Act, and the construction which finds the most support in the decided cases, is that which is here being considered, namely, that an award of the Board is "final and binding" only in proceedings before the Board and unless it should become the proper subject of judicial consideration and correction. Moreover, this construction of the phrase "final and binding" is the only one which is in harmony with the view, shown above to be the correct one (pp. 156-66), of the function of the Adjustment Board as being essentially one of adjustment and compromise, rather than adjudication of legal rights, and with the view of the nature of an award of the Board as representing a suggested compromise or settlement which may go so far as to depart substantially from the legal rights and obligations of the parties as established in their contract. If, as has been demonstrated, it was the intent of Congress, as manifested in the Railway Labor Act considered as a whole, that the Adjustment Board should function in that manner and that its awards should be regarded as suggested settlements or compromises rather than as judicial or quasi-judicial determinations of the legal rights of the parties, then, for the reasons already set forth, Congress certainly cannot be supposed to have intended, in its use of the words "final and binding" in Section 3 First (m), that the mere existence of such an award should foreclose or restrict the courts in the exercise of their proper function of considering and determining the legal rights and obligations of the parties under their contract.

Even if the phrase "final and binding" could properly be construed to exclude resort to the courts or limit the scope of judicial consideration, still it could not be given the effect of barring the present proceeding, because Section 3 First (m) expressly provides that an award shall

not have a "final and binding" effect in so far as it involves a money award, and the award of October 24, 1938, in the present proceeding did involve a money award, since the claims which it sustained were claims for money. That was manifested by the fact that the issuance of the award was soon followed by the presentation by respondents of claims for the sums of money which they alleged they would have earned had they been permitted to do the work in question (see p. 10 above). Accordingly, even if the words "final and binding" were construed so as to bar judicial consideration of the issues involved in a non-money award, the existence of the award of October 24, 1938, in the present case could not on that basis be construed as preventing the present proceeding from going forward, because it involved a money award. But, for the reasons already indicated, the phrase "final and binding" cannot be construed as either excluding or limiting judicial consideration of the issues involved in an award, whether it is a money award or a non-money award.

**D. The Phrase "Final and Binding" Can Have No Effect Whatever Upon the Rights of the Parties To the Dispute in the Case of an Award With Respect to Which the Two-Year Limitation Has Expired.**

It has been shown above that, in view of the language of the Act, and especially the provisions of Section 3 First (p), an award of the Board cannot be regarded as "final and binding" in the sense that it either precludes resort to the courts or limits the scope of judicial consideration with respect to the issues involved in the award. This is of course true during the two-year period following the effective date of the award, since, as pointed out above, a Section 3 First (p) proceeding is available during that period and the only status which an award has in that

proceeding is as mere *prima facie* evidence of the facts, so that the award can not be considered as precluding resort to the courts or as limiting the scope of the court's consideration of the facts or the law in a Section 3 First (p) proceeding brought during the two-year period.

*A fortiori* an award of the Board cannot be considered "final and binding" in the sense of precluding resort to the courts or limiting the scope of judicial consideration after the expiration of a period of two years from the date of the award. Since the only status which an award of the Board has under the Act is as "*prima facie* evidence of the facts" in a Section 3 First (p) proceeding, and since such a proceeding is barred after the expiration of two years from the date of the award (see pp. 195-97 above), it follows that an award of the Board would have no effect whatever in any judicial proceeding brought after the expiration of the two-year period during which a suit under Section 3 First (p) could be brought to make effective rights declared in the award. An award is not legally self-enforcing and does not in and of itself create any legal duty of obedience on the part of the party against whom it is entered (see pp. 157-66 above), and therefore it has only the effect expressly attributed to it by Section 3 First (p). That is the only type of suit in which such an award can be made effective, and its effect therein is expressly limited to that conferred upon it by the statute. In any other type of proceeding brought with respect to the same issues as those involved in the award, such as an action for damages or an injunction or declaratory judgment proceeding, an award of the Board would not have even the statutory status of being *prima facie* evidence, since it has that status in Section 3 First (p) proceedings only by virtue of the provisions to that effect in that section. Thus, an award of the Board would as such have no status or effect of any kind in any other proceeding than a Section 3 First (p) proceeding.

Clearly, therefore, an award of the Board would have no status or effect whatever in any judicial proceeding brought after the expiration of a period of two years following its issuance, since the only proceeding in which it could have any status or effect at any time, namely, a Section 3 First (p) proceeding, is no longer available with respect to that award. This does not of course mean that the present suit should not be permitted to go forward to a declaratory judgment. It has been pointed out above (pp. 202-9) that there still exists a live and active controversy between petitioner and respondents, with regard to their contract rights, and therefore the suit is a proper one for a declaratory judgment, even though a suit under Section 3 First (p) is no longer available.

It follows from these considerations that the phrase "final and binding" must be construed as meaning only that an award of the Board is binding unless it is judicially considered and corrected, and not as meaning that resort to the courts is precluded or the scope of a court's consideration is restricted by the existence of such an award; and, further, that this is true even in a Section 3 First (p) proceeding brought within the two-year period of limitation, so that *a fortiori* an award has no preclusive or restrictive effect in a proceeding brought after the expiration of two years from the date of issuance of the award.

## SECTION VI.

## TO READ INTO THE RAILWAY LABOR ACT BY IMPLICATION A CONSTRUCTION WHICH WOULD PREVENT PETITIONER FROM MAINTAINING THIS SUIT WOULD VIOLATE ELEMENTARY PRINCIPLES OF PROCEDURAL FAIR PLAY WHICH HAVE ALWAYS BEEN RECOGNIZED AND APPLIED BY THIS COURT IN ITS DECISIONS, AND WOULD ALSO UNDERMINE THE PROCESS OF COLLECTIVE BARGAINING BY DEPRIVING THE CONTRACTS ARRIVED AT BY SUCH BARGAINING OF THEIR CHARACTER AND EFFECTIVENESS AS CONTRACTS AND WOULD REDUCE THEM TO MERE "SCRAPS OF PAPER."

**A. To Hold That This Suit May not Be Maintained Would, as Respondents Themselves Contend, Vest Awards of the Adjustment Board, a Wholly Non-judicial Body, with "Practical Finality," Contrary to Basic Principles Frequently Announced and Applied in Decisions of This Court; and the Contention of Respondents That This Result is Permissible Because the Coercion Which Would Give Finality to the Awards is "Extra-Legal" and not "Legal" Coercion not Only Rests on an Unsound Distinction Which Substitutes Form for Substance, But is Inapplicable Here Because the Coercive Effect of Awards of the Adjustment Board is Made Possible by Provisions of the Railway Labor Act.**

From the foregoing sections of this brief it is apparent that the ultimate issue in the case at bar is whether or not a prohibition against the present suit is to be read by implication into the Railway Labor Act because supposedly required by a technical argument which assumes the point to be proved. That argument, which supplied the form of words that the majority of the Court

of Appeals used to reach its decision below, comes down essentially to this: that the Act provides a statutory form of judicial review in Section 3 First (p); that this statutory form of judicial review, although practically never used by the employes in whose favor it was created, must nevertheless be held to be exclusive in order to preserve to them certain advantages which they do not value sufficiently to avail themselves of; and that the statutory proceeding, although it rests in the sole option of the employes to institute, and although admittedly the employes practically never use it, must nonetheless be held to afford a completely sufficient and adequate opportunity for judicial relief to the employer, since the coercion to which the employer is subjected unless such a statutory proceeding is brought is not "legal," but only what is called "extra-legal," coercion. (See pp. 100-91 above.)

That is the argument. Fundamentally it rests on the assumption that Congress intended the adjustment procedure to result in awards that would have a "practical finality" which they would lack if the controversy were subject to re-examination in the courts (pp. 148-49 above), and that Congress intended those awards, vested with such finality, to find their sanction, as respondents have said, in the economic pressure of powerful labor unions rather than through judicial process. Without this assumption the argument falls to the ground; and yet of course it is an assumption of the very point to be proved. The formalism of the argument which is advanced to sustain and at the same time to conceal this basic assumption is shown by the fact that, in the first place the argument frankly insists that the fact that Section 3 First (p) proceedings are not brought must be totally ignored, and falls back on the proposition that they are *legally capable of being brought, if the other party chooses;* and, in the second place, the argument with equal frankness ignores the "extra-legal" economic coercion to which the employer is subjected and takes refuge in the excuse that the em-

ployer may at least not be subjected to "legal" compulsion to obey the award save through the medium of a court.

If this formal argument should prevail, then it would obviously become possible to erect a completely non-judicial body like the Adjustment Board into what would be in effect a Supreme Court, merely by so drafting a statute as to leave to the beneficiary of such a body's decrees the option of whether to enforce them through the courts or else ignore the courts and enforce them by economic pressure, since the argument assumes that such a statutory option left to one party must be held in and of itself to shut the doors of the courts in the face of the other party to the controversy. Such a result provides an ingenious way of substituting primitive self-help for the processes of adjudication.

To this consequence of their position respondents make the only answer possible. They say in effect, what of it? And they support this answer by the purely formal and abstract argument that, if the beneficiary of an award of the Adjustment Board chooses not to enforce the award through judicial proceedings under Section 3 First (p), but through private means available to him, that is nobody's business but his own, and his adversary, though placed at an overwhelming disadvantage, has no more right to complain than a private debtor whose creditor refuses to bring suit and attempts to force payment of the debt by some informal or "extra-legal" means.

To this argument there are several answers:

The first is that here the question for decision is whether such a result must be deliberately read into the statute by implication where the statute plainly does not require it and is compatible with an opposite result. Even assuming for the sake of argument that such a result would have to be accepted if plainly indicated as the intent of Congress, should it be held to be the intent of Congress where there is no evidence to show such

intent? Clearly, a statute ought not to be construed to require such a result where it is not necessary.

Secondly, however much it may be true that there are instances where the law does not or cannot force the submission of a dispute to adjudication, this does not mean, as respondents' argument assumes, that it must be taken to be the policy of the law to favor a result which would affirmatively prevent controversies from being submitted to adjudication.

Thirdly and most importantly, the argument is defective in the significant respect that it ignores the decisive factual differences which distinguish a controversy between two private individuals, on the one hand, from a controversy, on the other hand, between an employer and a powerful labor organization which is equipped to use economic force, to the great inconvenience of the public which the employer is bound to serve. Even assuming for the purpose of argument that in the case of an ordinary controversy between man and man the law would look with indifference on whether or not the controversy is submitted to adjudication through judicial methods or is settled by private pressures, it is clear that from a factual standpoint there are important differences, which cannot properly be ignored, between such a controversy and one to which a powerful labor organization equipped to use economic force is a party. Surely a type of judicial reasoning which would reach its result by ignoring differences of this kind in favor of abstract analogies would mark a reversion to an obsolete judicial technique and would depart from the judicial approach which has made progress in the law possible and to which the employe above all owes most of his important rights.

No field of law more than labor law rests on recognition that important differences in fact should be taken into account and may lead to corresponding differences in legal results. Nearly all the basic rights of labor which have won the protection of the law have done so because

the law has recognized the important factual respects in which the employe stands in a different position from other persons. This recognition of fact differences is the basis of the right to strike, for example, and is the reason why strikes are not treated as unlawful boycotts and conspiracies *per se*. It is the reason why contracts of employment are not subject to specific performance and why it is constitutional for employes to be treated for many purposes as a special class. It is not too much to say that the whole body of labor law rests on the proposition that the law accords recognition to fact differences.

Since this is so, it is hardly appropriate for those who speak for employes and represent labor organizations to urge in this or any other case a reversion to judicial conceptions which treat dissimilar situations as alike and ignore differences of fact. If fact differences are accorded recognition by the law in cases where the result is to enlarge the rights of employes, there is no sound reason for ignoring them and resorting to legal abstractions in other cases merely because the result of recognizing them in those cases would be to limit some power that labor would like to have. It therefore seems clear in the case at bar that, in considering whether a statute should be so construed by implication as to subject the employer to economic pressure from a labor organization without the possibility of recourse to the courts, any conclusion that is reached should not be based on the assumption that the situation is simply on all fours with a mere private controversy between an individual debtor and an individual creditor, but recognition should be accorded to the important distinction that exists between the position of a debtor whose creditor merely fails to bring suit and an employer who, if no proceeding is brought by employes under Section 3 First (p), is inevitably placed in a position where it is subjected to labor-union pressure which it cannot successfully resist.

The body of our labor law rests on recognition of the

relative inferiority in bargaining position of the individual employe as compared with the industrial employer. It rests, in other words, on a recognition of relative positions of factual superiority and inferiority between two classes of parties. There is likewise a relationship of inferior and superior power as between a railroad and the organizations representing its employes, with respect to the exertion of so-called economic pressure. This relationship of inferior and superior capacity to exert pressure effectively is so obvious as to need no comment. A railroad today cannot afford to resist the demand of a labor organization powerful enough to cause the cessation of the railroad's public service. The situation is thus wholly different in fact from that of a debtor whose creditor merely fails to bring suit. The creditor is without other power of coercion; the labor organization is equipped to coerce.

This Court cannot ignore the fact, pointed out above (pp. 103-23), that every practical incentive operates upon a labor organization which has won an award for its members before the Adjustment Board to impel the organization to refrain from hazarding that award in a suit under Section 3 First (p), and to enforce it instead by the power which it so amply possesses of disrupting the service which the employer owes to the public. The risk of such disruption is one which the employer dare not take, and this is the plain and obvious explanation of why the instances of resistance have been so few. Accordingly, if the employer is to have no opportunity of judicial relief otherwise than through a suit brought by the employes under Section 3 First (p), and if a proceeding like the present one is not available to the employer, then because of the obvious relative positions of the employer and the labor organization the result must be that the employer will have to yield to the labor organization's demand without any judicial determination of the employer's rights.

There is another difference between the situation of a

debtor whose creditor merely refuses to bring suit and a railroad-employer whose employes decline to proceed under Section 3 First (p) and instead compel the employer by superior pressure to comply with an award of the Adjustment Board. In the latter case the failure to sue is not merely accompanied by effective and overwhelming compulsion, as is not true in the former, but the result is furthermore to give effect to a determination of a statutory non-judicial agency without affording the party against whom that determination is directed an opportunity for his day in court. In other words, a device is created for enforcing a non-judicial determination like that of the Adjustment Board without any opportunity for a judicial determination of the rights of the parties. A way is found for vesting a non-judicial decision with finality.

That this may not be done is settled by principles which this Court has repeatedly enunciated and applied in recent as well as in earlier decisions. Today it is still established law that when a legislature provides a statutory remedy against a non-judicial determination but leaves that remedy to the option of one party to the controversy and in the meantime exposes the other party to hazards and pressures which make effectively for compliance, the courts will provide judicial relief for the latter party in an appropriate proceeding, even though the statutory remedy is plainly and expressly intended to be exclusive: *Ex Parte Young*, 209 U. S. 123, 28 S. Ct. 441 (1908); *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 35 S. Ct. 214 (1915); *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 40 S. Ct. 338 (1920).

Thus, in *Ex Parte Young, supra*, this Court, speaking through Mr. Justice Peckham, said (pp. 163 and 165):

> "It is further objected that there is a plain and adequate remedy at law open to the complainants and that a court of equity, therefore, has no jurisdiction

in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it, at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test, as obedience to the law was thereafter continued, and he might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery.

• • • • • • • •

*"To await proceedings against the company in a state court grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court by writ of error to the highest state court, would place the company in peril of large loss* and its agents in great risk of fines and imprisonment if it should be finally determined that the act was valid. *This risk the company ought not to be required to take."* (Emphasis supplied.)

Similarly, in *Oklahoma Operating Co.* v. *Love, supra,* a statute authorizing an administrative commission to fix rates for public utility service provided, as the only and admittedly exclusive method of judicial review, that a non-complying utility might be penalized by the commission for its disobedience, and such penalty order would be subject to judicial review in which the utility might challenge the legality of the rate order. A utility against which a rate order had been made, instead of waiting for the commission to institute penalty proceedings

against it, appealed directly to the courts for injunctive relief, and this Court, in holding that such relief should be granted, said, through Mr. Justice Brandeis (pp. 336-37 of 252 U. S.):

> "So it appears that the only judicial review of an order fixing rates possible under the laws of the State was that arising in proceedings to punish for contempt. * * * By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is open to him by way of appeal on the whole record to the Supreme Court. *But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident.* * * * The penalty may apparently be imposed for each instance of violation of the order. * * * *Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements.*" (Emphasis supplied.)

It should be noted that the exclusive statutory procedure held inadequate in both the foregoing cases resembles the allegedly exclusive remedy available to petitioner under Section 3 First (p) of the Railway Labor Act in that in both instances the power to institute the judicial proceedings is placed solely in the hands of the other party to the controversy. In both instances the parties seeking judicial relief are powerless under the statute to take action themselves to set in motion the judicial machinery supposed to be available for their relief. To obtain judicial relief they must wait for the other party to act.

Their hands are tied; and in the interval they are subjected to hazards so great and cumulative that, from the judicial notice which will be taken of what can be expected of reasonable men, it is apparent that such men will prefer not to wait but to yield. Under such conditions the judicial remedy, which is apparently held out by the language of the law, is in substance and reality denied by the facts. It is an illusory and simulated remedy.

The basic principle underlying the decisions of this Court in the *Young* case, the *Wadley Southern* case, and the *Oklahoma Operating Co.* case is that, where a method of review provided by statute fails in fact to afford an adequate opportunity for a judicial determination of the rights of one of the parties, even though that method is plainly intended by the statute to be exclusive, the courts will nevertheless permit other and different procedure to be employed in order to assure to that party his day in court. A recent application of the same principle under somewhat different circumstances was made by this Court in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 59 S. Ct. 160 (1938).

That case involved a finding or declaratory order made by the Interstate Commerce Commission of a kind which had been held to be not reviewable under the three-judge court procedure provided by the Urgent Deficiencies Act (*Shannahan* v. *United States*, 303 U. S. 596, 58 S. Ct. 732 (1938)). No other review procedure was available by statute. Accordingly, the court held that the rights of the parties in the premises should be judicially determined through the general equity jurisdiction of the courts, since they were entitled to such a determination and it would otherwise be denied to them.

The same basic principle was again applied in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 59 S. Ct. 754 (1939). The suit in that case was brought in equity by the telephone company to determine whether or not the com-

pany was subject to the jurisdiction of the Federal Communications Commission, as it had been declared to be by an order of that Commission. The order of the Commission did not require the company to take any affirmative action but merely held it subject to the Commission's jurisdiction. The contention was advanced on behalf of the Commission that the order was not reviewable because it was "negative" in character and so came within the doctrine of *Procter & Gamble* v. *United States*, 225 U. S. 282, 32 S. Ct. 761 (1912), and cases following that decision, which held that so-called "negative" orders of administrative tribunals were not subject to judicial review. This Court, speaking through Mr. Justice Frankfurter, made a full and careful examination of the cases and reached the conclusion that the doctrine of non-reviewability of "negative" orders was unsound, and further that, where certain necessary conditions precedent were established, orders of administrative tribunals were generally reviewable. The conditions precedent required for access to the courts were stated to be (*a*) a case or controversy under Article III of the Constitution of the United States, (*b*) the conventional requisites of equity jurisdiction, and (*c*) the specific terms of the statute granting jurisdiction to the district courts.

An effort will doubtless be made by the respondents to distinguish the foregoing cases on the basis of the formal argument, above referred to, that in a situation like that presented by the case at bar the coercion through which the carrier may be compelled to comply with the Adjustment Board award, if denied access to the courts, is only an "extra-legal" coercion (see above, p. 233), whereas they will no doubt contend that in the cases above cited the challenged order, if immune from judicial re-examination, would have produced its damaging consequences through penalties imposed by law. In other words, to avoid the effect of the decisions in question they are again forced to take refuge in their conten-

tion that this Court should close its eyes to the actual compulsion which, as they themselves argue, would give to Adjustment Board awards an effect of "practical finality" if such a suit as the present one may not be maintained. Once again they can support their position only by resort to the contention that form should govern rather than substance.

Petitioner submits that form should not be permitted to override substance, especially where the principle at stake is as fundamental an element in procedural fair play as the one which is here involved. The principle that a non-judicial determination affecting private rights, and especially one involving contract rights, as in the case at bar, will not be allowed to have finality without an opportunity for re-examination of those rights in court is basic in our system of law as it has always hitherto been understood. In the words of Mr. Justice Brandeis (*St. Joseph Stock Yards* v. *United States*, 298 U. S. 38, 77, 84, 56 S. Ct. 720, 737, 740 (1936)):

> "• • • there must be the opportunity of presenting in an appropriate proceeding, *at some time, to some court*, every question of law raised, whatever the nature of the right invoked, or the status of him who claims it.
>
> • • • • • • •
>
> *"The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied."* (Emphasis supplied.)

In view of the basic character of this principle, it clearly should make no difference whether the compulsion which, in disregard of that principle, gives finality to a non-judicial determination without opportunity of access to the courts consists of "legal" compulsion, operating through statutory penalties, or of "extra-legal" pressures

which derive their potency in fact from a construction of the statute that bars access to the courts. The effect of both is the same in attempting to confer finality on a non-judicial decision, and both would equally deny to the aggrieved party the right of presenting "at some time, to some court," the issues of law involved—a right which Mr. Justice Brandeis characterizes as demanded by the "supremacy of law."

The force of this conclusion is demonstrated by the example of the Adjustment Board in the case at bar. Here is an agency which decides without permitting the defendant to answer the complaint, without hearing evidence, without submitting allegations to the test of cross-examination, without taking proof, without allowing the parties to present arguments to the referee who decides the case, and which claims and exercises the power of modifying contract rights. The reason which respondents frankly urge for not allowing those rights to be re-examined in court, and for not permitting a suit like the present one, which would afford the only opportunity for a judicial examination of those rights, to be maintained, is precisely that the decisions of the Board would thereby be deprived of the "practical finality which they would * * * otherwise possess" (Respondents' Brief in this Court on original argument, p. 46). In other words, respondents admit that the effect of this Court's adoption of their contention, and the effect of holding that the present suit may not be maintained, would give "finality" in practice and effect to the decisions of an agency of the character described above. Clearly such a result, no matter how strenuously it may be sought to be explained away by formal arguments, is a violation of the principle which Mr. Justice Brandeis declares to be demanded by the "supremacy of law."

Even, however, if this formal and abstract distinction between "legal" and "extra-legal" coercion should be accepted for the purpose of argument, and even if it

should be admitted for that purpose that the protection of judicial procedure will be granted only against coercion imposed through legal sanctions and not against coercive "private" sanctions, it still would not follow that the carrier must be denied the right to maintain a suit like the present one. If respondents' distinction be accepted, the carrier is at least entitled to have the kind of protection which respondents are willing to allow—*i. e.*, protection against what they term "legal" coercion. And the carrier's right to that protection would permit it to maintain a suit like the present one because the coercive pressures which, in the absence of adequate opportunity for judicial relief, compel compliance with Adjustment Board awards, do in fact spring in large part from the operation of law. In other words, they cannot properly be said to be "extra-legal," because they would not exist, or would not exist with anything like the same strength and effectiveness, but for certain provisions of law.

Consider first the ability of the employes through their labor organizations to provide an effective sanction for compliance with awards. It was pointed out above (pp. 235-38) that this ability serves to differentiate the situation involved in the present case from a mere controversy between private parties, one of whom refuses to bring suit. The reason for the superior and effective ability of the labor organization to compel compliance is largely, if not wholly, because of certain provisions of the Railway Labor Act. It is the law which equips the employes through their labor organizations with a coercive power to compel compliance that they would not otherwise possess.

This coercive power arises, in the first place, from the provision of the Railway Labor Act which requires a railroad employer to deal with all employes of a given class through a single labor organization which has been certified to the employer by a government agency, the National Mediation Board, as the qualified representative or bargaining agency of the class of employes in question

(Railway Labor Act, Section 2 Ninth). Obviously, in the absence of such a provision the coercive power of the labor organization would be enormously less. Without such a provision the employer would have a freedom of action, in determining whether or not to comply with employes' demands, that it entirely lacks when required by law to deal with a single labor organization. This again differentiates the position of the railroad-employer with respect to relations with its employes from the position of a merchant or other debtor whose creditor refuses to sue and seeks to enforce a demand by extra-legal means. The merchant has a choice not to go on dealing with the creditor who seeks to apply extra-legal compulsion—he is free to turn elsewhere. The railroad-employer has no such choice and no alternative source of supply with which to deal with respect to its labor. It must deal with the union which makes the demand or submit to be deprived of its labor force. Obviously, therefore, it is not in the same bargaining position as an ordinary merchant or trader who is free to transfer his business away from a creditor who is making unjustified demands. The railroad-employer is deprived of that freedom of choice by law. Therefore the pressure which the labor organization can so effectively exert to compel compliance with Adjustment Board awards is a pressure largely created and immensely fortified by law, and so is not "extra-legal" in the sense in which respondents seek to represent it.

But this is not all. The contribution of law to the exertion and effectiveness of the pressure does not end here. Not merely does the Railway Labor Act greatly weaken the railroad-employer's bargaining power by restricting such an employer to dealing with a single labor organization. It still further restricts the employer's freedom in those dealings by prescribing what shall happen in the event the employer decides not to comply with the labor organization's demands. If the employer

does so decide, and the labor organization decides to strike, the extent to which the employer can resist is limited by law. If mediation fails, the law requires that the dispute must be submitted to a so-called Emergency Board, which does not purport to declare the legal rights of the parties but recommends a settlement of any kind that it deems fit. This recommendation is required by law to be transmitted to the President of the United States, thus obviously placing the employer in a position where its freedom of choice as a bargaining matter is reduced to the vanishing point.

It is accordingly clear that it is the provisions of the Railway Labor Act which put the railroad labor organizations in possession of the means of pressure, and of the opportunities to make that pressure effective, which they can and do employ to enforce Adjustment Board awards without taking the risk of subjecting the controversy to the determination of a judicial court. Since this is so, it is not true that the pressure and coercion are "extra-legal" in the sense which might be true of the pressure exerted by one individual on another. The pressure here concerned is a pressure, the possibility of which is created by, and which owes its existence to, law, and therefore it should no more be allowed to defeat a party's right to a judicial determination than if it were a pressure which, as in the *Young* case and the *Love* case, operated through penalties created by law. In both instances it is the law which makes the pressure possible and effective, and it cannot therefore properly be termed "extra-legal" pressure. Accordingly, respondents' argument that the effect of such pressure must be ignored in the case at bar, because it is not "legal" pressure, falls to the ground.

In the light of what has just been said, respondents' whole argument obviously takes on an even more extreme form than has previously appeared. They say in substance that, even if a form of pressure is made possible by statute which would not exist apart from the statute,

nevertheless that pressure must be held to be "extra-legal" for the purpose of defeating the right of the party against whom the pressure is exerted to have his day in court. They are thus urging a construction of the Railway Labor Act as a whole which would convert that Act into a novel mechanism for substituting pressure for law. They urge that Section 3 First (p) must be construed to close the doors of the courts to the employer so that it may be compelled by pressure to comply with a non-judicial award of the Adjustment Board, thereby giving such awards a "practical finality which they would not otherwise possess;" and then, although the means of that pressure comes into existence as a result of the law, they claim that the pressure must be regarded as "extra-legal" in such sense as to elude the operation of the principle of the *Young* case and the *Love* case. If such a construction of the statute should be accepted, a way would obviously have been found not merely to devise statutes which would remove elementary rights from the protection of fair judicial procedure, but would also enable such a result to be achieved by implication without regard to the intent of the legislature. Of this something more will be said in the next subdivision of this section.

There is one additional and very important respect in which the coercion to which the carrier would be subject, if not permitted to maintain a suit like the present one, is clearly "legal" and not "extra-legal" coercion. As set forth above in the Statement (p. 10), the award of the Adjustment Board here involved resulted in the filing by the respondents of a large number of claims for money-payments. Because of the nature of these claims, which are for wages for work that these employes have not been called upon to perform under petitioner's present operating practices, these claims are accumulating from day to day while petitioner is meanwhile paying other employes to do the work. These claims are "legal" claims enforceable at law. Clearly their continuing ac-

cumulation as a result of the existence of the award operates with strong compulsory effect, and similar claims accumulating as a result of other awards would operate with like effect in other instances to compel compliance with the awards. These legal claims, since the are enforceable at law, are entirely comparable with the penalties involved in the *Young* case and the *Love* case, and their accumulation obviously constitutes "legal" and not "extra-legal" coercion. Yet unless such a suit as this may be maintained there is no way in which petitioner and other carrier-employers in like situations can avoid the effect of such coercion. Therefore, even if, as respondents contend, legal coercion and not factual coercion is the only kind of coercion which will move the courts to hold that an opportunity must be accorded for a judicial determination of the employer's rights, it is clear that such coercion is present in ample measure as a result of awards of the Adjustment Board and that accordingly the employer must be granted an actual and not merely an illusory opportunity for a judicial determination of its rights if the principle of the *Young* case and the *Love* case is not now to be overruled.

**B. Judicial Self-Restraint Should be Exercised in Reading Into Statutes, by Implication and in the Absence of an Expression of Congressional Intent, Novel and Unusual Schemes of Social Compulsion Which Violate Ordinary Standards of Fair Play and Which in the Long Run May React With Disastrous Effect Against the Very Groups and Interests That for the Moment They Appear to Favor.**

Petitioner's arguments throughout this brief have practically all had to be addressed to clearing away technical contentions which have been read into the statute. From respondents' argument it might be supposed that the provisions of the Railway Labor Act interpose a series of obstacles to the maintenance of the

present suit which petitioner, if it is to prevail, is under the burden of explaining away. On the contrary, as has appeared from the discussion, respondents' contentions are not founded in the Act. They have been read into it and built up above its provisions by attempted implication for the purpose of creating objections to this suit which the Act itself does not contain. These implications all grow out of a basic and initial assumption that Congress must be presumed to have embodied a certain policy in the Act—a policy of a drastic and novel character, coercive in method and arbitrary in results, which there is no slightest evidence to show that Congress ever even considered, much less intended to embody in legislative action.

The coercive character of the policy which is assumed by respondents' arguments, and upon which those arguments all ultimately rest, has been described in a number of places in the foregoing pages. Its essence is supposed to be that, after a dispute arising out of the interpretation of a contract has been submitted by the employes, without the consent of the employer, to a non-judicial agency of adjustment which feels itself free to make an award departing from or modifying the terms of the contract, the employer must thereafter be forever barred, save at the option of the employes, from submitting the question of its contract rights to a court, in order that the employer may be "induced" to accept the award by the pressure which a labor organization, taking advantage of its legal position under the Railway Labor Act, can exert. This is stated to be for the purpose of making the award "effective," and is said to be necessary because the award finds its sanction in the economic bargaining power of the employes, and because only so will it have a "practical finality," which it would lack if access to the courts were available to the employer.

The meaning and results of such a supposed policy are obvious. It means that, whatever may be the terms and

provisions of a contract which the employer has been able to negotiate with its employes by mutual agreement through the procedure of bargaining prescribed by law, nevertheless, if at any time thereafter the employes can persuade a non-judicial body like the Adjustment Board to alter or vary those terms in any respect that they may desire, retroactively as well as prospectively, the employer can be compelled, and must submit to be compelled, by the superior power of the labor organization to accept the variation, even where this may result in the employer's having to pay "damages" for the past, because it lacks an opportunity to have its rights and obligations under the contract as agreed upon determined in accordance with fair judicial procedure. This is not merely, as has been said above, the substitution of decision by pressure for decision by adjudication. It is also the end and annihilation of contracts and bargaining, in any sense in which those words have hitherto been used, between employer and employes in the railroad industry.

What basis is there for a court to read such a policy by implication into the Railway Labor Act? Nothing in the language of the statute supports it. Nothing in the legislative history of the Act, as disclosed by the proceedings in Congress, supports it. The only possible basis for reading it into the Act would be a theory of social or political policy, to the effect that the methods and results above described represent a sound solution of certain problems in the railroad industry and might for that reason appropriately be attributed to or fathered upon the legislature as a supposedly reasonable method of dealing with those problems.

Emphasis was laid, in a period which has now receded into history, on the desirability of judicial self-restraint in erecting social and economic theories and policies which have the approval of the judges into legal requirements without warrant from the text they are construing. Respondents' contentions in this case ignore the desir-

ability of such judicial caution, and amount to a veiled invitation to this Court to use the Railway Labor Act as a springboard for erecting into law a scheme of social and economic policy which certainly ought not to be adopted by judicial action without much clearer warrant from the statute, if it could even then be adopted consistently with this Court's obligations under the Constitution.

Not only would that scheme of policy provide a way whereby the process of determining contract and other private rights by adjudication would be supplanted and superseded in favor of the enforcement of private claims by superior pressure on the part of the claimant, but, as pointed out above, it would go farther and render contracts in practical effect a nullity, since their terms would throughout the life of the contract be subject to alteration at any time by the pressure of one party without opportunity for the other to have judicial relief. Such a state of the law would reduce contracts arrived at by collective bargaining in the railroad industry to mere "scraps of paper." They would only mean what the stronger party at any moment had the power to make them mean.

When two parties make an agreement there is nothing that can intelligibly be described as a contract, if that word is to have significance, unless each party is under a legal duty to abide by the terms of the contract as entered into. Each has given consideration on his part for the right to demand such compliance on the part of the other, and is therefore entitled to look to the other for such compliance. If, during the life of the contract and while it is still in force, he can be told with finality by a wholly non-judicial agency, not professing to follow the methods of adjudication but supposedly aiming instead at making settlements which may disregard the contract, that he is no longer to be entitled to the compliance which he bargained for and which the contract

contemplates, but must accept performance of a different kind, or must give other and different consideration for continued compliance, then the original agreement cannot be said to have been a contract in any proper sense or to have been anything but an illusory interchange of words. It affords no basis for reliance and reasonable expectation in mutual dealings, and does not perform the function which contracts are supposed to perform of defining reciprocal rights and obligations for the purpose of enabling the parties to know on what footing they stand with respect to one another during the period fixed by the contract.

It is of course true that the question is now being raised in academic legal debate* whether the relations between employers and the labor organizations representing the employes should any longer be on a contract basis or whether they should not frankly be converted to a basis of status, imposed, dictated and administered by public authority. Even if it be assumed that such a result might conceivably be thought desirable, there are nevertheless two comments which are pertinent with respect to the issues raised by the case at bar. The first is that, if such relations as are here involved are to be taken out of the area of contract and made the subject of public regulation, so that considerations of supposed policy may at all times govern them, then, unless our constitutional system is to be radically altered, such public regulation will have to function through agencies which follow at least a quasi-judicial procedure, and whose determinations will be subject to adequate judicial review. The second comment is that, for the moment and under existing legislation, labor relations in the railroad industry are clearly matters of contract.

The whole theory of the Railway Labor Act, as expressly and explicitly embodied in its terms, is that wages

*The Columbia Law Review has announced that it contemplates publishing a special issue on this subject in the near future.

and working conditions are to be governed by contracts. Section 2 First of the Act provides that, "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions," and the entire Act is replete with provisions which assume that contracts, arrived at by bargaining and negotiation between the parties through their representatives, are to govern these matters.

Furthermore, the Act plainly contemplates that the terms and provisions agreed upon between the parties and embodied in the contracts are to remain in effect and be performed, observed and complied with as agreed upon, during the life of the contract or unless and until it is specifically changed in accordance with the procedure provided by the Act for making such changes. Section 6 of the Act provides that carriers and representatives of the employes shall give thirty days' written notice of intended changes in agreements affecting rates of pay, rules or working conditions, and the Act then goes on to prescribe an elaborate procedure which shall follow the giving of such notice and which functions first through conferences between the parties, next through the intervention of the Mediation Board, and finally through the submission to a so-called Presidential Emergency Board of the question whether the contract shall be changed.

These provisions leave no room for doubt that, unless and until the procedure which they outline is followed through, the original contract between the parties is intended to remain in effect, with the inevitable result that either or both must be entitled to rely upon it and to insist that it shall be observed as agreed upon. These statutory provisions are clear indication of Congressional intent that the labor union pressure which may legitimately be employed to bring about changes in contracts must be confined to, and canalized through, the procedure expressly provided by the Act for effecting such changes.

If in addition, as respondents here contend, the labor organizations may at any time compel specific changes in this or that term of the contract through the Adjustment Board, without the employer's consent, then the contract becomes a fluid mass of uncertainties, without definiteness or substance from the beginning, and the employer, as has indeed repeatedly happened, may find itself at some subsequent time coerced into paying damages for having observed the contract as originally written and understood. On such terms a so-called contract, from the very moment that it is signed, affords no basis whatever for reliance or reasonable expectation. Such a contract, so-called, is clearly not a contract in any sense. It settles nothing, fixes nothing, establishes nothing, but on the contrary becomes a mere breeding point for endless further demands, claims and controversies. The Railway Labor Act, if construed to require such a result, would not be a statute of repose but a source of discord. Plainly, no such construction should be placed upon it.

There can be no doubt that Congress in enacting the Railway Labor Act intended to promote the interests of railroad employes and their organizations. No one would of course contend that for that reason the statute should be given the construction which will permit representatives of labor to do under its guise whatever they think most favors the interests of their groups. But if on a point of interpretation questions of policy are to be considered—and they obviously cannot be excluded—it becomes pertinent to ask whether a policy of promoting the interest of labor should lead to the construction here contended for by the respondents, or whether such a policy would in fact even be consistent with that construction. On a question of construction a reasonable intent must be attributed to Congress: and would it be reasonable to suppose that Congress thought that the interest of labor would be promoted by superseding and supplanting the process of decision by adjudication in favor of decision by

pressure and superior force? Can Congress reasonably be supposed to have thought that the interests of labor would be advanced by annihilating contracts and reducing collective agreements to scraps of paper? Yet both these consequences follow if the construction contended for by the respondents here should be adopted.

The great objective for which labor has contended has been to obtain and safeguard the right of collective bargaining. That effort, which has been successfully achieved in the Railway Labor Act, presupposes the importance, the value and the stability of contracts. If contracts are now to be made nullities, the result of labor's achievement is nullified. On the other hand, if contracts are to be recognized and accorded stability for the benefit of labor, labor must recognize them as vested with like stability for the benefit of the employer, since the essence of a contract is reciprocity of obligation. If for that reason it is now desired to brush contracts aside, the alternative for labor is bound to be either regulation by the superior power of government or a perpetual trial of force with the other elements in the community, which is unthinkable for long in an industrial society, and from which surely labor as such has nothing to gain. If one or the other of these results is not to follow, there must be respect for contracts and a willingness to abide by them when once made and until changed by mutual agreement. But a respect for contracts demands that they be interpreted and applied by fair judicial procedure and not twisted to whatever results superior pressure can bring about.

In the pendulum-swing of human affairs, claims which go beyond the ordinary average human sense of fair play have hitherto in our Anglo-American democracies always resulted in reactions which have subjected the claimants subsequently to excesses from the other side, and there is as yet nothing to show that labor may not itself, like all the other groups and elements in American life, need

the protection of the elementary principle of justice which would accord to this petitioner its day in court.

Obviously, very broad issues are opened up by the questions which have been raised in the case at bar, and, as always where questions of policy cannot be avoided, they are issues of long-range justice as against immediate shortsighted advantage. Where legislative language leaves open the possibility of judicial choice, there is no room for doubt as to the direction in which the reason of our law points toward a decision. But here the case is easier. Here the language of the Railway Labor Act contains nothing that would keep the petitioner from maintaining this suit. Here the Act expresses no policy that would keep the petitioner from maintaining this suit. Here, in order to defeat the petitioner's right it is necessary that there should be raised up by supposed implication and read into the Act a policy which is not there, which is inconsistent with basic principles always applied by this Court in its decisions, which violates elementary conceptions of justice and fair-play, and which is inimical to the permanent and long-range interests of labor.

For all of these reasons, petitioner prays that the decision below be reversed and that this Court hold that petitioner may be permitted to go forward with this suit.

Respectfully submitted,

JOHN DICKINSON,
GUY W. KNIGHT,
JOHN B. PRIZER,
*Counsel for Petitioner.*

FEBRUARY 20, 1943.

1740 Broad St. Station Bldg.,
Philadelphia, Pa.